

Counsel for Pursuers—Baxter. Agent—William Officer, S.S.C.

Counsel for Defenders—G. Wardlaw Burnet. Agent—George Andrew, S.S.C.

Wednesday, July 15.

SECOND DIVISION.

[Sheriff-Substitute of
Lanarkshire.

MACKINNON (GILMOUR'S TRUSTEE) v. THE
GLASGOW AND SOUTH-WESTERN RAIL-
WAY COMPANY.

*Agreements and Contracts—Railway—Agreement
to Carry Goods at Stipulated Rates—Construc-
tion.*

A railway company entered into an agreement with certain coalmasters to carry all their traffic of specified descriptions on the company's line to or from their collieries at a certain specified rate per ton per mile for every distance over six miles. It was stipulated in the agreement that in the event of the company charging to any trader, who was not a party to the agreement, for distances above six miles, for the same descriptions of traffic, to any place, lower rates than those stipulated in the agreement, then the company should give to the coalmasters who were parties to the agreement a corresponding reduction in the rates payable by them for their traffic of a similar description to such place, so long as such lower rates were charged against any other trader. The company carried the traffic of a trader not a party to the agreement, for a distance above six miles, at a rate which was not less in actual amount than the rate charged against the parties to the agreement, but which was less per ton per mile in proportion to the respective distances carried, per ton per mile, than the rates stipulated in the agreement. *Held* that the coalmasters who were parties to the agreement were entitled to a reduction in the rates paid by them corresponding to the lower rate charged to such trader.

This case related to the construction of certain clauses of an agreement entered into in May 1875 between the Glasgow and South-Western Railway Company of the first part (therein designated the first party), and Allan Gilmour & Company, coalmasters at Portland and Hurlford Collieries, and other coalmasters and brick manufacturers in Ayrshire (therein designated the second party). The following were the provisions of the agreement which related to the present case:—*First*, That the first party should from 1st January 1874 be bound to carry all coal, dross, and common and fire-clay bricks and tiles as in another agreement between the first party and the Eglinton Iron Company, sent by the party of the second part over any of the first party's railways from or to the second parties' collieries and brickworks. "*Second*, The second party respectively shall, subject to article eleventh hereof, as from the said date, pay to the first party, for and in respect of the traffic of the

second party before mentioned, the charges following, viz.—For and in respect of . . . coal and dross passing along the said railways, the second party shall pay to the first party the charges specified in Schedule B hereto annexed. *Ninth*, It is hereby provided and agreed that, in the event of the first party charging to any other trader, for distances above six miles, for the said descriptions of traffic to any station or place, lower rates than those stipulated in this agreement to be paid by the second party, then and in that event the first party shall give to the second party a corresponding reduction in the rates payable by them for their traffic of a similar description to such station or place, while and so long as such lower rates are charged against such other trader. *Eleventh*, It is specially agreed that, notwithstanding the rates or charges before specified, the first party shall be entitled to charge, and the second party shall be bound to pay, rates or charges similar to those which may for the time being be charged to and paid by the Eglinton Iron Company in respect of the carriage of common and fire-clay bricks and tiles, and coal and dross for land sale and shipment, not exceeding the scale of rates and charges paid by the second party immediately preceding the first day of January Eighteen hundred and seventy-four, and in the event of any consideration being paid, given, or allowed by the first party to the Eglinton Iron Company for an increase in the charges payable by them for the carriage of the said traffic, a corresponding consideration shall be paid, given, or allowed by the first party to the second party."

Schedule B, referred to in clause 2, specified the rates for coal and dross as follows:—"When carried six miles or under, the sum of sevenpence halfpenny per ton. When carried any distance above six miles, and not exceeding sixteen miles, the sum of one penny farthing per ton per mile. When carried any distance above sixteen miles, and not exceeding twenty-six miles, the preceding rate for the first sixteen miles, and for every mile thereafter the sum of three-farthings per ton per mile. When carried any distance exceeding twenty-six miles, the preceding rate for the first twenty-six miles, and for every mile, thereafter the sum of one halfpenny per ton per mile." . . .

In December 1884 William Mackinnon, C.A., as trustee under a trust-deed for behoof of creditors, executed by Allan Gilmour of Allan Gilmour & Co. above mentioned, raised the present action in the Sheriff Court of Lanarkshire at Kilmarnock against the Glasgow and South-Western Railway Co. He prayed the Court to find and declare that under the terms of the above-recited agreement between the railway company and the various coalmasters, "in the event of the defenders charging to any other trader than those who are parties to said agreement, for distances above six miles for the descriptions of traffic therein specified, namely, for coal dross and common and fire-clay bricks and tiles, to any station or place, lower rates than those stipulated by said agreement to be paid by the second parties thereto," namely, the rates specified in Schedules A and B, "then in that event the defenders are bound to give to the pursuer, as trustee aforesaid, and his successors in office, as one of the second parties to said agreement, a

corresponding reduction in the rates payable by them for their traffic of a similar description, to such station or place while and so long as such lower rates are charged against such other trader," and further, to find and declare that the defenders had been from a specified date charging to certain other traders specified, for a distance above six miles, for the carriage of coals to Troon Harbour, lower rates to the extent of 6d. per ton, than those stipulated in the agreement, and further to find and declare that the defenders were bound to give to the pursuer from the same date a reduction of 6d. per ton in the rate payable by him for the carriage of coals from Portland Colliery to Troon Harbour, so long as such lower rates were charged against the other collieries. There was also a petitory conclusion for payment of £198, 8s. 2d.

The pursuer averred breach of the agreement in several instances. The argument at the bar was confined to the instances averred, as follows, with the answers of the defenders thereto:—“(Cond. 10) As a further example of said disproportion of rates, the said defenders issued a table of rates for certain collieries in the New Cumnock, Cumnock, Auchinleck, and Water of Ayr districts, commencing at 25th August last, whereby they agreed to carry and are carrying coals from certain of these collieries to Troon Harbour, at rates considerably less than those stipulated in the said agreement, having regard to the respective distances. A copy of that table of rates is produced herewith and referred to. (Ans. 10) The agreement and table of rates are referred to. *Quoad ultra* denied. (Cond. 12) Further, in the case of Lanemark Colliery, New Cumnock (which is not embraced in said agreement), the defenders carry coal and dross therefrom to Troon and Ayr, distances of thirty-one and twenty-four miles respectively, at 1s. 9d. per ton to Troon and 1s. 7d. per ton to Ayr, while the rates according to said agreement should be 2s. 6d. to Troon and 2s. 2d. to Ayr respectively. (Ans. 12) Admitted that the defenders carry coal and dross from Lanemark Colliery to Troon and Ayr, distances of thirty-one and twenty-four miles respectively, at the rates specified. *Quoad ultra* denied.” The pursuer estimated the amount of overcharge made against him by the company at £198, 8s. 2d., being the sum sued for.

In defence the defenders stated—“That in none of the cases founded upon by the pursuers, nor, indeed, in any case, have the defenders charged to any other trader (not a party to said agreement), for distances above 6 miles, for the same description of traffic as that specified in the agreement, to any stations or places referred to in the condescendence, lower rates than those stipulated in the agreement to be paid by the second party thereto.” They also founded on the terms of article 11 of the agreement, and in reference thereto stated that “the rates charged by the defenders for the carriage of the pursuer’s coals, referred to in the petition (said coal being for land sale or shipment), do not exceed the rates charged to and paid by The Eglinton Iron Company for the carriage of their coal to the same place for the same distance, and do not exceed the scale of rates and charges paid by the second party immediately preceding the first day of January 1874.” They also stated, that the pursuer’s

construction of the agreement would be unworkable, and in particular it would not be practicable to apply a deduction of so much per mile overhead consistently with the provisions of the schedule annexed to the agreement.

The pursuer pleaded—“(1) The defenders being bound under said agreement to carry pursuer’s coals and other traffic above mentioned at the rates specified therein, and in the event of their charging a lower rate to any other trader for distances above six miles, to give the pursuer a corresponding reduction, and the defenders having charged to other traders a lower rate than that charged to the pursuer without allowing him a corresponding reduction, the pursuer is entitled to decree of declarator as prayed for.”

The defenders pleaded—“(3) The rates charged by the defenders for the coal traffic specified in the account annexed to the petition having been so charged in virtue of and in conformity with the terms and provisions of the agreement founded upon by the pursuer, the defenders are entitled to be assolizied from both the declaratory and the petitory or pecuniary conclusions of the action.”

The Sheriff-Substitute (HALL) pronounced the following interlocutor:—[After certain findings in conformity with the terms of the agreement]—“Finds it admitted by the defenders that for the carriage of coal and dross to Troon Harbour, for distances above six miles, they have, during the period from 1st September to 30th November 1884, charged to traders not parties to said agreement lower rates than those therein stipulated to be paid, and in fact paid during the same period by the pursuer for his traffic of a similar description to the said harbour, having regard to the respective distances: Finds that the pursuer is entitled to a reduction in the rates paid by him corresponding to the lower rates charged to such other trader and with these findings, appoints the cause to be enrolled in order that parties may be heard as to the amount of reduction to which the pursuer is entitled, &c.

“*Note.*— The matter chiefly in controversy between the parties is the construction of article 9 of the agreement, and, in particular, the effect to be given to the words ‘lower rates.’ This expression the pursuer seeks to have construed as importing rates lower by reference to the distance for which they are charged. The defenders, on the contrary, maintain that rates absolutely lower are meant, and that the elements of distance does not enter into the question. Thus, for the carriage of coals from his Portland Colliery to Troon, a distance of 12 miles, the pursuer pays 1s. 3d. per ton, being the stipulated rate of 1½d. per mile, when the distance does not exceed 16 miles. But suppose a trader, not a party to the agreement, whose colliery was 60 miles from Troon, should also be charged 1s. 3d. per ton for the carriage of the coals to that seaport, then, according to the defender’s argument, such trader would not be charged a lower rate than the pursuer within the meaning of the agreement, and the pursuer would consequently not be entitled to any reduction. To the Sheriff-Substitute it humbly appears that the mere statement of this argument is sufficient for its refutation. Can anyone for a moment believe that the Kilmarnock coalmasters would

take the trouble of bargaining with the railway company, not that they should get the advantage of their greater proximity to the Ayrshire seaports, but simply that they should not be handicapped on that account in their competition with more distant traders? What must be presumed to have been their intention on entering into the agreement is borne out by the language of the deed, which cannot without a forced and unnatural construction of its terms be made to yield the sense contended for by the defenders. In particular, their reading requires that the word 'rates' should mean one thing when used in connection with the second party, and another thing when used in connection with the outside traders, being equivalent to so much per ton per mile in the former case, and to so much per ton without reference to distance in the latter. It is said that the enforcement on all traders of an equal mileage rate without taking other circumstances besides mere distance into account is impolitic in the public interest, and reports by the Railway Commissioners were cited in which that opinion is expressed. But assuming the agreement to be binding at all, considerations of public policy, however material before it was concluded, cannot be permitted now that it has become the measure of the rights and obligations of the parties to regulate its construction or modify its effect. It is further said that the agreement in the view contended for by the pursuer is unworkable on account of the extreme difficulty and complexity of the calculations which it would involve. The Sheriff-Substitute has not for the present decided how the provision contained in article 9 falls to be practically applied. That matter was not argued to him, and he has reserved it for future consideration. But in the meantime it must be observed that any difficulty which may be found in the application of article 9 as it stands forms no reason for wresting it from its natural sense, though if sufficiently great it may be a good ground for so far setting aside the agreement altogether. With regard to article 11, on which the defenders also found, its bearing on the present question is not very obvious. The purport of that article is to empower the defenders, notwithstanding the rates specified in the agreement, to exact from the second party rates similar to those paid for the time being by the Eglinton Iron Company, not exceeding a certain fixed maximum, which of course implies that in the contemplation of the parties such rates were to be higher than those stipulated. Article 11 thus appears to be intended as a qualification of article 2, and it is so set forth in the agreement itself. During the period, however, to which the petition applies, no attempt was made by the defenders to raise the rates charged to the pursuer, or the other coalmasters forming the second party, above those stipulated in the agreement, and accordingly the provisions of article 11 never came into operation at all. It is stated by the defenders that 'the rates charged by the defenders for the carriage of the pursuer's coals, referred to in the petition, do not exceed those charged to and paid by the Eglinton Iron Company.' This statement is unfortunately somewhat ambiguous. If it means that the rates paid by the pursuer do not exceed those charged to the Eglinton Iron Company, having regard to the respective distances, then judging by the tables

produced it appears not to be true in point of fact, at least as regards some of their collieries. But assume that it is true, and that the Eglinton Iron Company are less liberally treated in the matter of rates than some other traders who are not parties to the agreement, is this to be held as indirectly operating a restriction of the pursuer's right under article 9, or is that article to be read subject to the implied proviso that the second party shall not be entitled to claim a reduction on account of lower rates being charged to other traders, unless and in so far as the Eglinton Iron Company gets the benefit of these lower rates. Are we, in short, to construe the words 'any other trader' in article 9 as meaning the Eglinton Iron Company, and the Eglinton Iron Company alone? The Sheriff-Substitute thinks that to give such a wide application and such a generally controlling effect to article 11 is inconsistent with the fair reading of the agreement. The case would be different if the rates payable by the second party were raised in virtue of article 11 to bring them into conformity with those charged to the Eglinton Iron Company, and if at the same time lower rates were charged to other traders; then undoubtedly a question of some nicety on the construction of article 9 might present itself; but it is one which does not arise, and need not be considered in this action."

Having thereafter resumed consideration of the case, the Sheriff-Substitute pronounced the following interlocutor:—"Finds that on a sound construction of article 9 of the agreement the pursuer is entitled to select any individual trader, not being a party to said agreement, to whom lower rates than those therein specified are charged by the defenders, and to insist on being placed on an equal footing with him: Finds that the rate charged by the defenders to the proprietors of Lanemark Colliery, who are not parties to said agreement, for the carriage of coal and dross from the said colliery to Troon Harbour, a distance of 31 miles, was, during the period from 1st September to 30th November 1884, 1s. 9d. per ton, instead of 2s. 6d. per ton, to which it would have amounted if calculated on the scale of rates specified in said agreement, being a reduction of 9d. per ton compared with said rates: Finds that between 26th September 1884, being the date of the pursuer's protest, and 29th November 1884, the pursuer paid to the defenders for the carriage from Portland Colliery to Troon, a distance of 12 miles, of 7936 tons 8 cwt. of coal, the sum of £529, 2s., being at the agreement rate of 1½d. per ton per mile, where the distance does not exceed 16 miles: Finds that the pursuer is entitled to a reduction on the rates so paid by him, bearing the same proportion to 1s. 3d. which 9d. bears to 2s. 6d.—that is to say, 4½d. per ton: Therefore decerns against the defenders for the sum of £148, 16s. 1½d., with interest, as concluded for: Finds it unnecessary to dispose of the remaining conclusions of the action: Finds the defenders liable in expenses," &c.

The defenders appealed to the Court of Session.

Appellants' authority—*Murray v. The Glasgow and South-Western Railway Company*, November 29, 1883, 11 R. 205.

Respondent's authorities—*Ransome v. The Eastern Counties Railway Company (Ransome, No. 2)*, 27 L.J., C.P. 166; *Denaby Main Colliery*

Company v. Manchester, Sheffield, and Lincolnshire Railway Company, 3 Rail. and Can. Cas. (Neville & Macnamara) 426.

At advising—

LORD JUSTICE-CLERK—I understand your Lordships do not wish to hear any further argument in this case, and I concur in that view, because I think that the defenders' counsel have entirely failed to displace the grounds on which the Sheriff-Substitute has decided it. The question relates to the construction of an agreement between certain mineral traders and the Glasgow and South-Western Railway Company, and to a matter which is often the subject of controversy, namely, the amount of rate to be paid by the traders, and the equalisation of rates among different traders. That in itself is a simple enough question, but there comes in here the further question, What if other traders who had not made this agreement are charged rates different from those mentioned in the agreement? That question is introduced by clause 9 of the agreement. I need not enter into any details of fact, these not being disputed by the parties.

The object of clause 9 is the equalisation of rates charged to outsiders with those charged to the traders who are parties to the agreement. Now, my opinion is, that though the words of that clause may admit of argument, their real and true meaning is not for a moment doubtful. The provision is—[reads clause 9]. I understand by "other trader" any trader outside of the agreement. It is plain enough that a good deal of complication might arise in the application of this clause apart from the question of construction which has been the subject of debate if these allowances or advantages were given at a different rate to different outsiders. I could conceive that a question might arise where you had two persons who were given additional facilities or allowances, and at the same time two traders under the agreement who were in different positions. But the meaning of the clause as it stands is simply this, that whereas the railway company had undertaken the carriage of certain articles for the traders who were parties to the agreement, at a certain rate per ton, they at the same time undertook not to allow any outside traders to convey his traffic at a lower rate per ton, and if not, the subscribers to the agreement were to be entitled to a similar reduction. I cannot read the clause in any other way. The defender's counsel contended that the real object of the clause was to equalise the cost to the traders, so that he who paid for 6 miles, or 10 miles, or 12 miles should pay as much but no more than he who had his coals carried for 20 or 30 miles. That would not be expressed by the term "rates." Rates imply payment on a principle, and the principle here adopted is so much per ton per mile. This is the standard, and according to that standard obedience to or infringement of this agreement is to be judged; if that be so, then there is no further question, because it is admitted that the company have given facilities of the kind to other traders. The Sheriff-Substitute has made a calculation, and he has found that according to the standard adopted in the agreement the charge to one trader whose case has been taken as an example should be considerably higher than it is, and I concur with him.

In regard to clause 11 a difficult question arises. It is not very clearly expressed, and we are told that the railway company are willing to go to proof on the question of the amount charged by them to the Eglinton Company, and they say that if the Eglinton Company are charged no more than the charge now made against the complainers they are not within the 9th clause at all. I am not prepared to give effect to the contention of the defenders.

LORD YOUNG—I am of the same opinion, and I confess without much difficulty. Indeed, to me the case is an unusually clear one. The only question of importance regards the construction of clause 9 of the agreement. Now, the agreement itself is an agreement between certain coalmasters and the Glasgow and South-Western Railway Company for the carriage of all traffic in "coal, dross, and common and fire-clay bricks and tiles" which may be forwarded over the company's lines from the pursuer's collieries and brickworks. The company bound themselves to take the traffic at certain rates, and the second party—that is, the coalmasters—bound themselves to pay these rates. The clause about rates is the second—"Second, The second party respectively shall, subject to article eleventh hereof, as from the said date, pay to the first party, for and in respect of the traffic of the second party before mentioned, the charges following, viz.—For and in respect of common and fireclay bricks and tiles passing along the said railways, the second party shall pay to the first party." And then Schedules A and B are referred to as setting forth the charges for the different articles—[reads Schedule B]. I may observe that sometimes "charges" and sometimes "rates" is used, really exegetically, to show that they have the same signification. I refer to Schedule B as referring to coal and dross, because it is about the rates charged for the carriage of these that the present dispute arises. These are the rates which the masters have agreed to pay and the railway company to accept.

Then comes clause 9, which says—"It is hereby provided and agreed that in the event of the first party charging to any other trader, for distances above 6 miles, for the said descriptions of traffic to any station or place, lower rates than those stipulated in this agreement to be paid by the second party"—that is a statement of an event on the occurrence of which this clause comes into operation—"then and in that event the first party shall give to the second party a corresponding reduction in the rates payable by them for their traffic of a similar description to such station or place while and so long as such lower rates are charged against such other trader." What is the meaning of that? The rates are calculated at so much per ton per mile for distances over six miles—that is to say, 1½d. per ton per mile for 16 miles, ¾d. per ton per mile for the next 10 miles, and for any longer distance ½d. per ton per mile. These are the rates stipulated in the agreement, and which the parties to the agreement were charged. Now, it is surely a simple idea, the occurrence of the event that the company have charged some other trader lower rates than those there stipulated—that is, lower than 1½d. per ton per mile for the first 16 miles, ¾d. per ton per mile for the next 10 miles,

and so on. The pursuer says that the event has occurred, and, confining his attention to the Lanemark Colliery only, he says in his condescendence—[reads condescendence 10].

Now, I fancy “rates considerably less” means lower rates than those stipulated in the agreement. It would not require any definition to reach that conclusion, the tables of rates for carriage to Troon being lower than those stipulated. Then in condescendence 12 an instance is given, being the instance taken by the Sheriff-Substitute, and on which his judgment proceeds. The rate charged to Lanemark Colliery for 31 miles was 1s. 9d. per ton. That must be reached by a calculation at a certain rate per mile. If it is not less than 1½d. for the first ten miles, ¾d. for the next ten, and so on, then the rates are not lower than those stipulated in the agreement. If a calculation on those sums does not give you the rates charged to Lanemark, but higher rates, then the Lanemark rates must be lower than the rates stipulated in the agreement. The Sheriff-Substitute has, as your Lordship says, presumably made a calculation, and he says you get 2s. 6d. for 31 miles. It is thus too clear for argument that the event stated in clause 9 has occurred. The company is charging other traders lower rates than those stipulated in the agreement, for if they were charging the same rates they would be charging them 2s. 6d. instead of 1s. 9d. for 31 miles.

The event has then occurred. What is the consequence? Clause 9 specifies it. The first party shall give to the second party—that is, to every individual coalmaster signing the agreement—and these are numerous—a corresponding reduction in the rates charged for their traffic. Now, the object of the present action is to claim such a reduction. The coalmasters say, We aver that you are charging other traders lower rates, and we ask you to fulfil the agreement by making a corresponding reduction in our rates. I cannot conceive a simpler case. The defenders’ counsel contended that the agreement as to rates has nothing to do with the rate per ton per mile, but means merely that the railway company undertook not to charge a larger sum to any person for any distance, however long, than they charged the coalmasters with whom they made the agreement, and that so long as they do not do that the coalmasters have nothing to complain of. I think that is an extravagant contention. I do not think nonsense is too severe a term to characterise it.

The only other argument advanced by the defenders is founded on clause 11. I am of opinion that in the facts as stated on record clause 11 has no application. It was plainly not intended to express the whole agreement between the parties and to strike out all the rest of it. According to any argument which has been advanced on it, that should be the effect of it. But sensible men would not make one clause the agreement, cancelling the rest. The meaning of it is this—if the Eglinton Company shall be satisfied that their traffic cannot be carried by the railway company without loss, it is not reasonable to ask them to continue to carry it at the rates stated in the agreement, which are the same as those stipulated in the agreement with the Eglinton Company. But there is a curious manifestation of want of confidence in the integrity

of the railway company here by a provision that if they offer an inducement in any form—money or otherwise—to the Eglinton Company to consent to raise the rates payable by them, then the same thing shall be given to the parties to this agreement. But the Eglinton Company do not see their way to pay higher rates than those which they had contracted for, being the same as those stipulated in this agreement, and so clause 11 has no application here. It might have been averred that the Eglinton Company had consented to pay higher rates, and the fact might have been appealed to to compel the parties to this agreement to consent to the same thing. But it was frankly assented to by the defenders’ counsel, when I put it, that the only occasion for appealing to this clause was that the Eglinton Company had taken no action under the clause in this contract corresponding to clause 9 in this agreement—that is to say, to enforce a reduction so as to make them equal to other traders from whom the company were exacting lower rates. I do not think that was the meaning of clause 11—to prevent the parties to this agreement enforcing clause 9, if the Eglinton Company were not enforcing the clause in the contract corresponding to clause 9 here.

On the whole matter, then, I concur in the judgment of the Sheriff-Substitute.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD CRAIGHILL was absent.

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

Counsel for Pursuer (Respondent)—Sol.-Gen. Robertson, Q.C.—Graham Murray. Agents—Gordon, Pringle, & Dallas, W.S.

Counsel for Defenders (Appellants)—Dean of Faculty Balfour, Q.C.—C. J. Guthrie. Agents—John C. Brodie & Sons, W.S.

Thursday, July 16.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

CLYDE v. THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY.

Railway—Statutory Powers—Obstructing Traffic—Statutory Penalty—Competency of Ordinary Action—Reparation—Glasgow City and District Railway Act 1882 (45 and 46 Vict. cap. cxxvi).

A railway company whose lines were to be carried through a large town were bound by their Act to restore portions of the carriageway of any street to be from time to time closed by them for traffic for the purposes of their works within three months from the day on which they should be so closed, under a penalty of £20 for each day for which such portions remained un-restored beyond that period, which penalty should be recoverable in the Sheriff Court on summary application by any proprietor