

LORD YOUNG, LORD RUTHERFURD CLARK,
and LORD TRAYNER concurred.

The Court dismissed the appeal.

Counsel for the Appellant—Kennedy.
Agent—J. D. Macaulay, S.S.C.

Counsel for the Respondent—Watt.
Agent—A. Urquhart, S.S.C.

Tuesday, December 1.

SECOND DIVISION.

[Lord Wellwood, Ordinary.]

SMITH (ALLAN'S TRUSTEE) v. ALLAN
& SONS.

Landlord and Tenant—Lease—Construction—Obligation to Maintain—Arbiter—Proof—Damages for Breach of Contract.

A lease stipulated that the premises let should be maintained and left in good condition to the satisfaction of an arbiter, failing which the landlord should be entitled to execute all necessary work at the expense of the lessees as the same should be certified by the arbiter.

In an action by the landlord, held that the remedy specified in the lease was not exclusive of his right to sue for damages for breach of the lessee's obligation of maintenance.

Upon 6th March 1886 John Baird Smith, writer, Glasgow, trustee of the late Thomas Allan senior, let to Thomas Allan & Sons, the works of Springbank and Roselea, under a letter of lease from the lessees' agents, which provided, *inter alia*—"Our clients (the lessees) shall accept of the whole premises let, including the machinery, plant, and others, conform to inventories to be prepared at the sight of Alexander Steven after mentioned, and to be subscribed as relative to the lease as in good tenable and working order and condition, and shall bind themselves and their successors, at their own expense, to maintain and uphold them in the like good order, repair, and condition during the whole period of the lease, and to leave them so at the termination thereof, ordinary depreciation and tear and wear excepted, but so that at all times during the currency of the lease and at the termination thereof the said ironworks, including the said machinery, plant, and others, shall be maintained in good tenable and working condition as going works, and that to the satisfaction of Alexander Steven, engineer in Glasgow, whom failing by death or otherwise, Thomas Steven, after designed, who shall have right from time to time to obtain access to the said works upon giving reasonable notice for the purpose of inspecting the same, and ascertaining whether our clients are keeping these and the said machinery, plant, and others in working order and in the condition foresaid; and in the event of the said Alexander Steven, whom failing as afore-

said, the said Thomas Steven, being of opinion that the said works, machinery, plant, and others are not being kept in said working order and condition, and our clients failing to put them in such working order and condition foresaid within a reasonable time after notice in writing requiring our clients to do so, either by him or your clients or their agent, then your client shall be entitled, without any further intimation or judicial steps, to execute all such repairs or other work necessary to put the said works, machinery, plant, and others in good working order and condition as aforesaid, and for doing which our clients shall be bound to give all necessary facilities, and that at the expense of our clients or their foresaids, who shall be liable in payment of the expense thereof, as the same shall be certified by the said Alexander Steven, whom failing the said Thomas Steven."

On 18th December 1888 Mr Smith required the defenders to execute certain repairs he then considered necessary, but the defenders declined to do so, and upon 31st January of that year they left the premises. Mr Smith then appealed to Mr Alexander Steven, the arbiter, who, after some procedure, upon 5th March 1890 pronounced an interlocutor finding that the lessees had failed to keep the premises in good order and repair in fourteen specified particulars.

Upon 25th February 1891 Mr Smith raised an action against Thomas Allan & Sons to have them ordained to pay the cost or expense of executing the repairs specified in the arbiter's interlocutor, "or otherwise to pay the pursuer the sum of £750."

The pursuer averred—" (Cond. 4) The said premises were not re-let after the defenders left them, and they have since been unoccupied, and the plant and machinery have not been in actual use since the defenders left them. It is very doubtful, in view of the delay and the deterioration in consequence of the defenders' failure to fulfil their obligations which have now taken place, whether the said premises, plant, and machinery will be again occupied and used, and in these circumstances it would be unreasonable for the pursuer to execute the repairs in question. In consequence of the defenders' refusal to execute said works, and the consequent delay, the works, &c., in question have, since the termination of the defenders' tenancy, deteriorated to such a further extent that the repairs and operations for which the defenders were and are liable would not now restore them to the state of repair in which the defenders were bound to leave them, or into such a state as would enable the pursuer to re-let them as a foundry, and it is therefore reasonable that the pursuer should be paid the cost of said repairs. The said works, &c., are worth £1500 less than they otherwise would have been in respect of the defenders' failure duly and timeously to execute said repairs; and in consequence of the defenders' said failure the pursuer has suffered loss and damage to the extent of £750."

The pursuer pleaded—“(2) The pursuer is entitled to decree in respect of the diminished value of the said works, &c., and the loss caused to the pursuer by the defenders' failure to execute the said repairs.”

The defenders pleaded—“(3) Mr Steven having wrongfully taken evidence (including the opinion of experts) as to the state of the works, the finding or interlocutor is *ultra vires*, and not binding on the defenders. (4) The finding or interlocutor of Mr Alexander Steven is *ultra fines compromissi*, in respect, *inter alia*, it puts a particular construction on the obligation in the lease.”

Upon 15th June 1891 the Lord Ordinary (WELLWOOD) pronounced this interlocutor—“Repels the defences in so far as stated as objections to the interlocutor of the arbiter Alexander Steven, dated 5th March 1890, founded on in the summons; *Quoad ultra* sists process *in hoc statu* that the pursuer may, if so advised, proceed to make the necessary repairs on the premises, buildings, plant, and machinery referred to on the record, and to obtain from the said Alexander Steven or Thomas Steven, mentioned in the letter of lease, a certificate of the expense thereof in terms of the said letter of lease: Meantime reserves all questions of expenses.”

“*Note.*—The foundation of this action is an interlocutor pronounced by the arbiter, to whom the pursuer appealed, finding that the premises, plant, and machinery in question were not left in a proper state of repair by the defenders. I hold that interlocutor to be binding upon the parties so far as it goes. But having invoked the arbitration clauses of the lease I think the pursuer is bound to proceed in terms of the lease, viz., to execute the necessary repairs, and obtain a certificate of expense from the arbiter. Having done this, he may return to the Court and obtain decree for the sum so fixed. I do not think that he is entitled to substitute a claim of damages at common law for the specific remedy given him in the lease. The reasons assigned in the fourth article of the condescendence on adjustment are not in my opinion relevant or sufficient to warrant such a peculiar claim.”

The pursuer reclaimed, and upon 10th July 1891 the Second Division pronounced this judgment—“Remit the case to his Lordship with instructions to recal the sist and proceed with the cause, reserving all questions of expenses.”

Upon 8th September 1891 the Lord Ordinary “recalled the sist formerly granted, and having again considered the cause, in respect that the pursuer stated that he did not intend to execute the repairs mentioned in the Lord Ordinary's interlocutor of 15th June 1891, assoilzied the defenders from the conclusions of the summons as laid: Found the defenders entitled to expenses subject to modification to be fixed after taxation, &c.”

“*Note.*—I understand that the case was remitted to me by the Inner House to be disposed of on the footing that the pursuer

did not intend to execute the repairs mentioned in my interlocutor of 15th June 1891. No further argument was addressed to me for the pursuer, and as I see no reason to alter the opinion which I formerly expressed in the note to my interlocutor of 15th June, I think the defenders must be assoilzied.”

The pursuer reclaimed, and argued—The Lord Ordinary was wrong in thinking that the only method open to the pursuer was to repair the buildings and sue for the damage. The defenders had reduced them to such a state that it was not worth while repairing them. If the Lord Ordinary's view was sound, the result would be that the defenders would have used the works, escaping all liability for the damage they had caused. But because there was one method prescribed in the lease that did not shut the pursuer from claiming damages—*Bidoulac v. Sinclair's Trustee*, November 29, 1889, 17 R. 144.

The respondents argued—The pursuer could have done one of two things. Under the lease he could have had the repairs stated in Mr Stevens' report executed, and sued the defenders for the cost, or, secondly, he could have sued the defenders at common law for damages to his property. He had elected to proceed under the stipulations of the lease, and yet by his own admission he did not intend to go on with the repairs. He was, however, barred by his election from suing the defenders for damages at common law, and could only proceed under the conditions of the lease.

At advising—

LORD YOUNG—There is no doubt that the defenders' obligation under this lease was to keep the premises in tenantable repair during the time they were there, and to leave them in good order. They left them, and then the pursuer, in fulfilment of the conditions of the lease, referred to Mr Alexander Steven to discover in what condition the premises had been left. Mr Steven found that they had not been left in good tenantable repair—that is, that the defenders were in breach of their agreement. The next question is, what remedy was open to the pursuer who suffered from the breach? The lease specified one remedy. If the defenders failed to leave the premises in good tenantable repair, the lease sanctioned the landlord putting them into repair and saving the defenders further cost. But that is not specified as being the only remedy open to the landlord. If the defenders declined to put them in order, and the pursuer was unwilling to repair, it is, I think, not arguable that the pursuer should have no remedy—his remedy is just to sue the defenders for a money reparation for the breach of the contract as he has done here.

The Lord Ordinary seems to have thought that the only thing the pursuer could do was to execute the repairs himself and sue for the damage. His Lordship therefore sisted the action to give time to the pursuer to execute the repairs. We recalled the sist,

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, assailed 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 tenable 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