

Thursday, June 19.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

DUNFORD & ELLIOT v. MACLEOD
& COMPANY, *et contra*.

Contract—Breach of Contract—Right to Rescind—Carriage by Sea—“Equal Monthly Quantities as may be Mutually Arranged”—Undue Delay in Providing Ships—Failure to Load Ship Accepted—Affreightment—Damages—Measure of Damages.

D, a shipbroker, contracted with M to provide ships for the conveyance from Bilbao to Middlesborough of about 10,000 tons of iron ore “from September to December 1900 (both inclusive), in about equal monthly quantities as may be mutually arranged.” No ships were supplied by him during September. On 5th October D notified that a ship would be ready about the 20th. M accepted the ship by letter of the same date, and asked for another ship at once. On 15th October D wrote that another steamer would be ready by the end of the month. This was accepted by M.

The first steamer only reached Bilbao on the 28th, and the second on the 30th. Neither could be prepared for sea until two days after arrival.

On 27th October M wrote that in consequence of D's failure to fulfil his obligation he cancelled the contract. He further instructed his agents at Bilbao not to load the ships.

In cross actions of damages raised by the parties, *held* (1) that M was entitled to cancel the contract, and to damages in respect of delay in providing ships, the measure thereof being the amount of loss sustained by him through not being able to ship the iron ore during the two months in question; but (2) that M was not entitled to refuse to load the ships which had been sent to Bilbao with his approval, and was liable in damages to the extent of the difference in freight between the charter rate and that at which D was able to re-charter the ships.

Observed (per Lord M'Laren) that a contracting-party is not entitled to proceed so as to cause unnecessary loss to the other party without any resulting gain to himself.

On 20th August 1900 a contract was entered into between Macleod & Company, merchants, Glasgow, and Dunford & Elliot, shipbrokers and shipowners, Middlesborough, by which the last-named agreed to provide steamers not exceeding a cargo capacity of 2500 tons for conveyance of iron ore from Portugaleta to Middlesbrough-on-Tees, at a freight of 8s. 3d. per ton.

The charter-party provided as follows—“Charterers to have the option of cancelling this charter if steamer is not ready

to load at Bilbao on or before This charter is for the conveyance of about 10,000 shipment from September to December 1900 (both inclusive) in about equal monthly quantities as may be mutually arranged. No steamer in any case to exceed 2500 tons cargo. Demurrage in no case to exceed £25 per day on any steamer, and demurrage, if any, to be settled each voyage separately.”

This contract followed upon two others between the same parties constituted by charter-parties dated 13th February and 10th April 1900. Both of those charter-parties contained a condition as to the conveyance of the ore “in about equal monthly quantities,” the second also containing thereafter the words “as may be mutually arranged.”

The first and second contracts were fully executed, but the last ship under the second did not finish loading till 27th October, Macleod & Company having submitted to some delay in regard to the furnishing of the ships under the first, and still more in regard to the second contract.

Under such contracts the practice is that the shipbroker, when he has a ship ready, notifies to the charterer, either by post or telegraph, the name of the ship, its tonnage, and the date of its expected arrival. This is called “stemming” the ship, and if the charterer does not object to the ship, his assent would in ordinary circumstances be taken to mean that the ship is accepted in part fulfilment of the contract. No ships in fulfilment of the third contract were supplied by Dunford & Elliot in September, and the only ships which were “stemmed” in fulfilment thereof were the “William Harkess” and the “Hylton.” The position and probable date of arrival of these vessels were notified to Macleod & Company, on 5th and 15th October respectively, as due respectively at Bilbao on 20th October and about the end of the month, and Macleod & Company accepted them as in part fulfilment of the third contract. The “William Harkess” did not arrive at Bilbao till 28th October, and the “Hylton” did not arrive till 30th October. On 27th October Macleod & Company intimated that in respect of Dunford & Elliot's failure to supply vessels they cancelled the contract, and they then refused to load the “William Harkess” and the “Hylton” when they arrived.

In these circumstances Dunford & Elliot raised an action against Macleod & Company in the Sheriff Court of Lanarkshire, concluding for damages in respect of the defenders' alleged breach of contract in cancelling the charter and in refusing to load the “Harkess” and the “Hylton.” A counter action was raised by Macleod & Company against Dunford & Elliot concluding for damages in respect of the loss sustained by them owing to their inability to get steamers for the ore, to carry which Dunford & Elliot ought to have supplied steamers during September and October.

The pursuers in the first action averred that they had sustained loss amounting to the sum sued for owing to the loss of time

of their steamers in consequence of the defenders cancelling the contract and refusing to load the steamers sent, which would have carried about 3500 tons of ore, and to the difference in freight between the charter rate and that at which they were able to re-charter the ships. They averred further that under such contracts as these it was usual for the parties mutually to accommodate each other as to the exact time when steamers were to load and the exact quantities, and that under the former contracts the stemming of ships by arrangement with and consent of the defenders had been delayed for a time.

The defenders admitted that under the former contracts the pursuers had fallen behind in providing their contract quantity of tonnage, but stated that the first two contracts had been completed in October 1900. They averred that the months of September and October were favourable ones at Bilbao for loading ore; that they had paid a high rate of freight because they relied on getting at least half the tonnage during September and October; that the pursuers in spite of repeated requests failed to supply the stipulated tonnage during these months, and that "the first boat the pursuers stemmed under the charter was the 'William Harkess' on 5th October, which they said would be ready on 20th October, but which did not arrive at Bilbao until Sunday 28th October, and could not have completed her loading until about 7th November. The second steamer stemmed was the s.s. 'Hylton' on 15th October, which only sailed that day from the Tyne with cargo for St Nazaire, and which could not arrive at Bilbao in time to be loaded during October, and did not actually arrive there until 30th October."

The defenders further averred that had the ore been shipped during these months they could have sold it at a profit of at least 5s. 6d. per ton, which on 5000 tons amounted to £1375.

The defenders pleaded that they were entitled to cancel the contract in respect of the pursuers' breach of their obligation.

In the counter action the pursuers Macleod & Company claimed damages for loss of profits to the amount of £1375, brought out as stated above.

The two actions were conjoined and a proof was allowed, the purport of which, so far as necessary, sufficiently appears from the judgment of Lord M'Laren, *infra*.

The Sheriff-Substitute (GUTHRIE) on 29th May 1901 pronounced the following interlocutor:—"Finds that the parties Dunford & Elliot on 20th August 1900 entered into a contract with the parties Macleod & Company to carry 10,000 tons of iron ore from Bilbao to Middlesborough from September to December inclusive, in about equal monthly quantities as might be mutually arranged on being paid freight at the rate of 8s. 3d. per ton: Finds that in December Dunford & Elliot supplied no tonnage, and that in October they supplied only two steamers, the 'W. Harkess' and the 'Hylton,' which were due or expected

to arrive at Bilbao respectively on the 20th October and about the end of the month, and carrying respectively about 1450 tons and 2000 tons: Finds that the position and probable date of arrival of said vessels were notified to Macleod & Company on the 5th and 15th October respectively, and that Macleod & Company accepted the same as in part fulfilment of the said contract: Finds that the vessels arrived at Bilbao on October 28th and 30th respectively, but were not loaded by Macleod & Company, who had on 27th October intimated that in respect of Dunford & Elliot's failure to supply vessels they cancelled the contract: Finds that on that date Macleod & Company were not entitled to cancel the contract so far as the vessels already 'stemmed' and accepted were concerned: Finds that the parties Macleod & Company suffered loss by the failure of Dunford & Elliot to convey the monthly quantities of iron ore during September and October, and assesses the damages due to them therefor at £500 sterling: Finds that from that sum there falls to be deducted the sum of £300 sterling, at which the damages for wrongful refusal to load the 'W. Harkess' and 'Hylton' fall to be assessed: Therefore decrees in favour of the parties Macleod & Company for the sum of £200 sterling in the action at their instance against Dunford & Elliot, with interest thereon as craved: Finds them entitled to expenses in the conjoined actions modified to one-half."

Note.—"The parties in this case had three contracts in the form of charter-parties for the conveyance of iron ore from Bilbao to Middlesborough and Stockton, each being a time contract. Messrs Dunford & Elliot, of Middlesborough, are shipowners and shipbrokers, but in their dealings with Macleod & Company they were simply middlemen, making time contracts with iron merchants for tonnage which they chartered in their own names and at their own risk, and they did not, in working any of these contracts, employ any of the half-dozen steamers which they own. Evidence has been led with regard to the two earlier of these contracts extending from February to October inclusive, mainly for the purpose of showing that there was a great deal of give and take between the parties, and that they did not stand on the strict words of the contract. Messrs Dunford & Elliot seek to show that the words 'in about equal monthly quantities as may be mutually arranged' received in practice so wide an extension as in my humble opinion would deprive them of all significance whatever. It is true that in working out the previous contracts, and even in the first month of this last (which overlaps the second contract), 'the mutual arrangements' or concessions were considerable, and in May no iron ore was conveyed at all, just as none was carried under the contract in question in September. But it is unreasonable, and there is no principle for saying, that such departures from the exact terms of the agreements are to be

invoked and founded upon in order to put a strained or artificial meaning upon a subsequent independent contract, although *in pari materia*. It is impossible, with any regard for legal principle, to hold that Macleod & Company ever renounced their right to have tonnage to the extent of about 2500 tons a month during the four months from September to the end of the year.

“Even under this contract they bore with the want of shipments in September, but they pressed for steamers as soon as that month came near an end, and the reason for doing so has been made sufficiently clear in the evidence, viz., that the mines at Bilbao being worked in open cast, the minerals are deteriorated by the winter weather, and from October onwards bring a lower price. Messrs Dunford & Elliot succeeded on 5th and 15th October in “stemming,” that is, arranging for and intimating to their charterers, twosteammers, and the charterers, Messrs Macleod & Company, being made aware of the size and present position and probable time of arrival of these steamers, wrote that each of them was ‘in order,’ that is, that they agreed to take them as chartered under the agreement in question. It cannot be said that Dunford & Elliot misrepresented the position of these ships, or that they arrived so late as to entitle the shippers to refuse them after having accepted them. Yet on the day before the first of them, the ‘W. Harkess,’ arrived at Bilbao, on 27th October, Macleod & Company for the first time repudiate the contract and refuse to load either ship. I humbly think that Dunford & Elliot were greatly in arrear with their contract, having allowed the greater part of two months to elapse without supplying tonnage, but that by agreeing to take the ships in October Macleod & Company had to that extent condoned or acquiesced in the breach.

“There was a serious breach of contract for which they could claim damages, and I do not doubt that they might with fair notice repudiate the contract so far as unfulfilled and charter against Dunford & Elliot. But when one contracting party becomes entitled to damages by a breach on the side of the other, he is not entitled wantonly to aggravate the damages. It is difficult to regard the action of Macleod & Company in any other light than this. No reason has been suggested why Macleod & Company should not have loaded the ‘W. Harkess’ and the ‘Hylton’ instead of applying to other shipowners, and I therefore think that the loss occasioned to Dunford & Elliot by their unnecessary repudiation of these vessels ought to be deducted from any damages to which they may be entitled. That loss may be fairly assessed at £300. It is somewhat difficult to determine how the damages due to Macleod & Company should be calculated. It is said that in cancelling the contract they were really catching at an advantage by relieving themselves of a high rate of freight at a time when freights had fallen. It is not necessary to form an opinion as to Messrs

Macleod & Company’s motives or the quality of their conduct from any but a legal point of view, but it is sufficiently clear that they did not in September or October, when freights were high and tonnage scarce, get any benefit from the contract in question, and that they cannot be severely condemned for availing themselves of their legal right to be relieved of a bargain which the other party had not fulfilled. Upon consideration I think that the ‘W. Harkess’ and ‘Hylton,’ though arriving at Bilbao in October, cannot both be dealt with as if they had been October shipments. Practically, if we allow that the ‘W. Harkess’ might have been despatched within October, only 1450 tons would have been shipped in the two months instead of 5000, leaving a deficiency of 3550 tons. It appears that, allowing for the fall in freight by which Macleod & Company profited in November and December, the loss by not having this quantity of ore forward for September and October sales would exceed £500. After deducting £300 above referred to, Macleod & Company are thus entitled to £200 as damages. Success is so divided that I might almost award no expenses, but as Macleod & Company really prevail I give them half expenses.

“The decision turns I think on general principles. There was argument upon the cancelling clause in the printed form of charter-party. But I think the parties intended to leave it blank, because inapplicable to the time contract expressed in the margin. That is really the leading clause.”

Dunford & Elliot appealed to the First Division, and argued—In order to justify one party in cancelling the contract there must be a breach of such a nature as went to its root, and showed that the other party did not intend to go on with it—*Turnbull v. M’Lean & Company*, March 5, 1874, 1 R. 730, 11 S.L.R. 319; *Ireland & Son v. Merryton Coal Company*, July 13, 1894, 21 R. 989, 31 S.L.R. 834; Bell’s Prin., sec. 108. The case fell under the rule of law in *Tyers v. Rosedale and Ferry Hill Iron Company* [1875], L.R., 10 Ex. 195. If, as here, the parties agreed to postpone delivery, that amounted to nothing more than a variation by consent of the original contract, which would not entitle either party to rescind. There must be something amounting to repudiation of the contract by the other party—*Mersey Steel and Iron Company v. Naylor, Benzon, & Company* [1884], 9 App. Cas. 434. The failure to make one periodical delivery did not justify rescission, but only gave a claim of damages in respect of that particular delivery.

Argued for the respondents—The general principles of law laid down by the reclaimers were not in dispute, but the question was, did they apply to this case? The variation here did go to the root of the contract. During the first two months no vessel had been tendered, and time necessarily being of the essence of this contract, it was clear that the reclaimers did not intend to carry out the contract, and the respondents were clearly entitled to rescind—*Mersey Steel and Iron Company v.*

Naylor, Benzon, & Company, cit. supra,
p. 443.

At advising—

LORD M'LAREN—In this case there are cross-actions, the first being at the instance of Dunford & Elliot, shipbrokers and ship-owners, against Macleod & Company, who are merchants dealing in iron ore, and in this action damages are claimed from Macleod & Company because of their refusal to load two steamers which had been sent to Bilbao to bring cargoes of iron ore to Middlesborough under a standing contract.

Macleod & Company in defence assert their right to refuse to load on the ground of persistent delay on the part of Dunford & Elliot in sending ships to satisfy the contract, and in their cross-action they claim damages for the loss and inconvenience consequent on this delay.

Three consecutive contracts between the parties for the carriage of iron ore are set forth in the record in the conjoined actions. But in this opinion I shall only refer to the terms of the third contract, because it is common ground that the first and second contracts were fully executed, and while it appears from the correspondence that Macleod & Company submitted to some delay in regard to the furnishing of ships under the first, and still more in regard to the second contract, I cannot hold that their consent to what amounts to a variation of previous contracts in any way binds them to extend the like indulgence to the other contracting party in regard to the contract as to which the parties are in dispute. I think that this contract, like all other mutual engagements, is to be executed punctually according to its terms—that is, within the limits of punctuality which are possible in shipping contracts where a few days may be unavoidably lost in connection with the outward voyage.

The substance of the third contract (dated 20th August 1900) is that Dunford & Elliot undertook to provide carriage from Bilbao to Middlesborough for about 10,000 tons, shipment from September to December inclusive in about equal monthly quantities as might be mutually arranged, at the rate of 8s. 3d. per ton.

Under such contracts it is customary for the shipbroker, when he has a ship ready, to notify by post or telegraph the name of the ship, its tonnage, and the date of its expected arrival. This is called "stemming" the ship, and if the owner of cargo does not object to the ship his assent would in ordinary circumstances be taken to mean that the ship is accepted in part fulfilment of the contract.

In the present case it is not disputed that the various ships "stemmed" are to be appropriated to the different contracts in the order of the dates of shipment. Now, as the shipments under the second contract were not completed until October, it follows that all shipments in September, and so far as necessary shipments in October, must be appropriated to the second contract, and that subsequent ship-

ments only fall under the third contract.

A schedule of the various shipments is printed, and from this statement it appears that the last shipment to account of the said contract was that of the "Colina," the dates being, arrival 16th October, finished loading 24th October.

The only ships "stemmed" in fulfilment of the third contract were the "Harkess," which arrived at Bilbao on 28th October, and the "Hylton," which arrived on 30th October. These are the ships which were rejected by Macleod & Company on their arrival at Bilbao in the assertion of their right to rescind on the ground of delay. *Prima facie* the shipbrokers were more than a month in arrear, because their obligation was to provide carriage for about 2500 tons in each of the months of September, October, November and December, while as a matter of fact they had provided no carriage at all during the month of September, and these two ships, which were to be the beginning of the third contract, only arrived at the very end of October. Dunford & Elliot say that these ships were accepted to account of the third contract, and that such acceptance amounted to a waiver of the right to rescind on the ground of delay; and it is therefore necessary to consider the correspondence on this point.

Without quoting from the correspondence which preceded the "stemming" of the two last-mentioned ships, I may say that throughout the months of September and October Macleod & Company frequently complained of delay, and urged their correspondents to bring forward ships to be loaded under the third contract. On 5th October Dunford & Elliot telegraphed "Have fixed 'W. Harkess,' ready about 20th, Stockton direct. Suppose this in order." This was accepted by letter of the same date, with the addition "Please note we must have another boat at once." On 15th October Dunford & Elliot telegraphed "We stem 'Hylton,' 2000 cargo, against contract Bilbao, Middlesbrough." In answer to a letter of inquiry they wrote again on 16th October: "Hylton. We confirm our wire advising you that this steamer will be ready about the end of the month." This was agreed to. Now the "Harkess," which was promised to be ready on the 20th, only arrived at Bilbao on the 28th October. The "Hylton," which was to be ready "about the end of the month," arrived on the 30th, but there is evidence to the effect that the ships would not be ready for loading until two days after arrival. On 27th October Macleod & Company wrote that in consequence of Dunford's failure to fulfil their obligation they cancelled the contract. They also wrote to their agents in Bilbao not to load the ships.

The question then is, whether in all the circumstances there was such delay as would amount to non-fulfilment of obligation, and would justify the action taken by Macleod & Company under their letter of 27th October. Although the question is a narrow one, I have come to the conclusion that Macleod & Company were entitled to

rescind. The "Harkess" carries about 1500 tons, and the "Hylton" about 2000 tons, and supposing the engagement as to these ships to be fulfilled, there was still an unfulfilled balance of 1500 tons to be carried in September and October. The "Harkess" was eight days late, or ten days if "ready" means ready to begin loading. Now a delay of eight days from the true date of performance is one thing, and a delay of eight days added on to a period of six weeks from the true date is quite another. At the time of rescinding it was quite certain that no ore could be shipped under the contract until the beginning of November. Macleod & Company had not assented to the contract being postponed as to time; they only accepted the particular ships; and they are quite entitled to say that they did so in the expectation that a third vessel would be immediately named to complete the carriage of 5000 tons to be performed in September and October. When they found that the "Harkess" was late, and that a third vessel was not forthcoming for this period, they might very properly reconsider their position, especially in view of the fact spoken to that Spanish iron ore is injured by exposure to weather, and is of less value when shipped in the winter months. This was a time contract, and when parties stipulate for the carriage of so many tons in each month, I think it must be taken that time is a material condition of the contract, unless the contrary is proved by the clearest evidence.

In this case I think that time was a material condition, and after what had occurred I think that Macleod & Company might reasonably conclude that the delay was likely to be continuous, and that they were justified in putting an end to the contract as regards future shipments.

It does not follow that Macleod & Co. were entitled to refuse to load the two ships which had been sent to Bilbao with their approval. Their rejection of the ships is defended on the ground of delay; but as regards the particular ships I hold (distinguishing this point from the general question of delay) that the arrear can only be reckoned from the time of expected arrival. Having regard to the necessary uncertainty of the day of sailing from the last port of discharge, and to practice as shown in the correspondence, I am of opinion that the times of arrival notified were only meant to be approximate, and that Macleod & Co. were not thereby released from their obligation to load these ships against contract, although they might take the delay into account in deciding whether they would continue to hold to the contract for the future. It is also to be considered that a contracting party is not entitled to proceed so as to cause unnecessary loss to the other party without any resulting benefit to himself. Macleod & Co. had no other steamer ready to load when they rejected the "Harkess" and the "Hylton," and their action had the effect of keeping these ships idle for a considerable time.

I am therefore of opinion that the Sheriff is right in holding that damages are due under both actions.

As to the amount found due, the Sheriff has awarded £500 to Macleod & Co. in respect of the failure of Dunford & Elliot to carry the monthly quantities of iron ore during September and October, under deduction of £300 due by them for wrongful refusal to load the "Harkess" and the "Hylton."

I think the Sheriff has rightly treated the first claim as valid with respect to the whole period of September and October, for, as I have already had occasion to observe, the "Harkess" and "Hylton" could not have begun to load until the beginning of November.

This sum of £500 is only an estimate of the amount of the loss which Macleod & Co. sustained by not getting the iron ore at the time when it is in good condition and when there is a good demand for it, and getting it when deteriorated by wintry weather and when iron ore fetches a lower price. This sum is given for the delay in the loading of the 5000 tons which should have been shipped in September and October. It amounts to 2s. per ton, which seems reasonable. In fact, Macleod & Co. could have got freight in November for 1s. 6d. less than the contract freight.

As regards the £500 awarded to Dunford & Elliot as damages in respect of Macleod's wrongful refusal to load the "Harkess" and "Hylton," actual loss is proved to the extent of £316. This finding is therefore correct.

I say nothing about the ship "Jane" which was offered for November, because if the contract was rightly terminated, Macleod & Co. were of course not bound to accept the offer of this ship.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor:—

"Refuse the appeal: Find in terms of the findings in fact and in law contained in the interlocutor of the Sheriff-Substitute dated 29th May 1901: Affirm the same, and of new decern in terms thereof: Find neither party entitled to the expenses of the appeal, and remit," &c.

Counsel for the Appellants—Clyde, K.C.—Younger. Agents—J. & J. Ross, W.S.

Counsel for the Respondents—Salvesen, K.C.—M'Clure. Agents—Webster, Will, & Company, S.S.C.