The pursuers reclaimed.

Argued for them—The defenders had let an unsafe subject without making proper regulations. *Weston* v. *Tailors of Potterow*, July 10, 1839, 1 D. 1218; *Black* v. *Cadell*, Feby. 9, 1804, Mor. 13,905; *Dunn* v. *Hamilton*, March 11, 1832, 15 Sh. 853; *Kerr* v. *Magistrates of Stirling*, Dec. 18, 1858, 21 D. 169.

At advising—

Lord Justice-Clerk—It is clear that if a landlord lets a subject to a tenant, and the tenant by his fault and negligence causes injury to a third party, the tenant alone is liable. The case of *Weston* merely implies that if there be fault on the part of the landlord, he also is liable. No doubt if a landlord lets a subject which is notoriously unsafe and dangerous, he is not freed from liability for the dangerous condition of the subject merely by taking his tenant bound to keep the subject in a safe condition. In that case a liability may remain with the landlord, especially if the landlord be a trustee for the public, as the present defenders are. Therefore, had it been averred that this ferry was dangerous in whatever manner it might be worked, and whether the provisions of the lease were observed or not, I am not prepared to say that such an averment might not be relevant. But on this record it is clear that the melancholy accident which resulted in the death of the pursuer's husband was really partly caused by the overcrowding of the boat and partly by the flood which was then coming down the river. The tenant had the fullest discretion as to starting his boat in that state of the water, or of using another boat worked by oars. The immediate occasion of the swamping was the state of the wire rope, and this the tenant was expressly bound to keep in a state of repair. We must recollect that this system had been in operation for two years. The landlord, after he had obtained an available obligation to repair, was surely not bound to inspect the rope. It seems to me that there was some looseness in the arrangements, for unquestionably there ought to have been regulations applicable to the new system of drawing the boat along a wire rope. But I can see no grounds on this record for inferring liability against the defenders.

Lord Ormidale—It is not disputed that the defenders were entitled to let the ferry, and the question is, whether they have relieved themselves from liability by the lease? That depends on the terms of the lease, for if the terms of the lease led to the wrong complained of, the authorities shew that in that case the lessor would be liable. But if the subject be let for a lawful purpose, and if the lease does not expressly or by implication permit any injurious act to be done, the lessor would not be liable. Here it is not said seriously that the lessee was incompetent, and he was taken bound to have fit workmen and to supply the wire rope. The pursuers assume that working the ferry by a wire rope is a safe system, and the faults they find with it are faults of the tenant's, not of the landlords.

Lord Gifford—I concur. It is not said that this was a public ferry which the Magistrates were bound to work themselves. They were entitled, like any private proprietor, to let the ferry. There would have been nothing illegal in a stipulation that the tenant was to provide everything. Here the boat belonged to the Magistrates, but nothing is said against the boat. The charge is made against the rope, which the tenant was bound to supply and maintain. There is a want in this record of any precise fault which could be put in issue against the defenders. I could understand a case that the tenant was a mere pretence, and was really the servant of the defenders, but that is not the case here.

The defenders pointed out that the Lord Ordinary had dismissed the action, and asked decree of absolvitor. This was refused, and the Court adhered.

Counsel for Pursuers—C. Smith—Mair. Agent—Wm. Spink, S.S.C.

Counsel for Defenders—Balfour—Jameson. Agent—T. J. Gordon, W.S.

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*Tuesday, July 3.*

## SECOND DIVISION.

[Lord Rutherfurd Clark Ordinary.

## HARRIS AND OTHERS *v.* HAYWOOD GAS COAL COMPANY.

*Ship—Demurrage—Charter-Party.*

It was stipulated in a charter-party that three days' notice should be given to the merchants before the ship was ready to receive the cargo at the port of shipment. The ship not having arrived until after the day notified in terms of the charter-party, and having in consequence been unable for some time to get a loading berth—*held*, in an action for demurrage, that the shipowner was not entitled to calculate the lay-days from the date of the ship's actual arrival.

*Ship—Charter-party—Notice.*

Notice of time of ship's arrival, which, under the above charter-party, *held* to be insufficient.

*Charter-Party—Lay-Days.*

*Opinions* as to whether a clause in a charter-party excepting from the running hours allowed for loading any delay caused by riots, hands striking work, accident to machinery, or any other hindrances beyond control, which might impede the ordinary loading of the vessel, covered the case of delay occasioned by a crowd of shipping in the harbour preventing the vessel obtaining a loading berth.

This was a claim for demurrage by Harris and others, residing at Middlesborough, owners of the steamship "Stentor," against the Haywood Gas Coal Company, carrying on business at Glasgow and Granton.

On 7th August 1876 the pursuers entered into a charter-party with the defenders, whereby it was agreed that the pursuers' steamship "Vulcan" or "Stentor," in their option, should proceed to Granton, and there load coals for London at a

certain rate of freight. Thirty running hours (Sundays and general holidays excepted) were to be allowed the defenders for loading, and thirty running hours for discharging the cargo, except in case of riot, or any hands striking work, accidents to machinery, or any other hindrances beyond control which might impede the ordinary loading and discharging of the vessel. The time allowed for loading was to begin to run when the steamer was reported to the staithmaster as ready to receive the cargo, and the time for discharging when the steamer was reported to the consignees or their agents at the port of discharge, except when after 6 P.M., when the time for discharging was to begin at 6 o'clock on the following morning. The demurrage payable by the defenders was to be at the rate of 12s. per hour for time expended over and above the said hours allowed for loading and delivery. It was further agreed that the said charter should continue in force for twelve consecutive months from about 1st September 1876. By a marginal note to said charter-party it was also agreed that three days' notice should be given to the merchants before the steamer was ready to receive her cargo at Granton.

In September the pursuers notified that they were sending the "Stentor" to Granton, but they did not give definite notice as to the date of her arrival until the 16th, when they telegraphed to the defenders that she would be at Granton on the afternoon of Monday the 18th. The vessel, however, did not arrive until 5.30 P.M. on Tuesday the 19th, and in consequence she could not get a berth, and her loading was not completed till 6 P.M. on 22d September. The pursuers in consequence claimed demurrage for forty-two and a-half hours.

In October the "Stentor" was again due at Granton under the said charter-party. On Tuesday the 10th October the pursuers wrote to the defenders' brokers in Leith stating that the "Stentor" would be at Granton on Sunday the 15th. The defenders averred that their brokers had no authority to receive such notice. On 12th October the pursuers wrote to the defenders' Granton office, again stating that the vessel would be at Granton on Sunday "ready for Monday morning." The defenders denied that notice to their Granton office was sufficient under the charter-party—it should have been sent to Glasgow. The vessel did not arrive in Granton until four o'clock on the afternoon of Monday the 16th, and her loading was not completed until the 21st. The delay was again caused by the loading-berth having been lost through the lateness of the vessel's arrival. In consequence of this delay in loading, the pursuers claimed demurrage for sixty-eight hours. It appeared that the loading accommodation at Granton was very limited.

The Lord Ordinary assoilzied the defenders, and added the following note:—

"*Note.*—In this case the loading of the 'Stentor' was delayed by the crowd of shipping in the harbour, which prevented her from getting a berth. It was pleaded by the defenders that they were protected by the clause which excepts from the running hours any delay caused by riots, hands striking work, accidents to machinery, or any other hindrances beyond control, which might impede the ordinary loading of the vessel. In the opinion of the Lord Ordinary this argument is not well founded. He thinks that the general words cannot be construed to include a risk which is of the most ordinary occurrence, and which according to a well-settled rule falls on the charterer. The things specified are of exceptional occurrence, and the general words should not, it is thought, be held to comprehend a source of delay more frequent and better known than any of those which are specified.

"The next question relates to the notice which the pursuers were bound to give before the running hours commenced. In the body of the charter-party it is declared that the time for loading shall begin to run when the steamer is reported to the staithmaster as ready to receive cargo. But by a marginal note it was agreed that three days' notice should be given to the merchants before the steamer was ready to receive her cargo at Granton.

"The claim for demurrage relates to two voyages. With respect to the first, it is said that the notice was that the 'Stentor' would probably arrive at Granton on Monday, 18th September. She did not, in point of fact, arrive till 5.30 P.M. on Tuesday, 19th September. In regard to the other, the notice was that she would arrive on Sunday, 15th October, while she did not arrive till Monday, 16th, at 4 P.M. In each case she was reported on arrival as ready to receive cargo, but she could not get a berth. This would not have occurred if she had arrived in the first case on the 18th, and in the second on the 15th. But the pursuers claim that the running days shall begin from the time when she was reported to be ready for cargo.

"It appears to the Lord Ordinary that the parties did not very fully appreciate, if at all, the effect which the marginal note made on the clause in the body of the charter-party applicable to the running hours. But it is made a condition that the charterers should have three days' notice of the time when the ship should be ready to receive cargo. Unless that notice was given, the running hours, it is thought, could not begin. The question therefore is, whether due notice was given of the time from which they are calculated? The Lord Ordinary answers this question in the negative. Without attempting to decide what may be due notice according to the meaning of the charter-party, he does not think that in this case it was given. The period between the time when it was announced that the ship would arrive and the time of her actual arrival seems to have been too long to entitle the pursuers to calculate the running hours from the later date.

"Questions were raised as to the persons to whom, and the place at which, notice was to be given, but it is not necessary to enter into them.'

The pursuers reclaimed.

Authorities—Bell's Com., i. 622; Abbott on Shipping, 268; Maclachlan on Shipping, 491; Kay on Shipmasters and Seamen, i. 152, 155; *La Cour* v. *Donaldson & Son*, May 22, 1874, 1 R. 912; *Dall' Orso* v. *Mason & Company*, February 4, 1876, 3 R. 419.

At advising—

LORD JUSTICE-CLERK—This case has been ably argued, but after the explanations which have been given I do not think it is one of difficulty. By the charter-party, which is printed in the appendix the owners of the "Stentor" undertook to load a cargo of coals at Granton, the cargo to

be brought to and taken from alongside the vessel at the merchants' risk and expense. The charter-party allows thirty running hours (Sundays and general holidays excepted) to the freighters for loading, and the same time for discharging the cargo, "except in case of riot or any hands striking work, accidents to machinery, or any other hindrances beyond control which may impede the ordinary loading and discharging of the vessel." The reckoning for loading is to commence when the steamer is reported to the staithmaster ready to receive cargo; the time for discharging begins to run when the vessel is reported to the consignees or their agents at port of discharge. The rate of demurrage is 12s. for every hour expended over and above the thirty hours allowed for loading and delivery. And then occurs this marginal note, on which the decision of the case really turns—"Three days' notice to be given merchants before steamer is ready at Granton." There has been some argument on the question whether a sufficient notice in the sense of this stipulation was given on at least one of the voyages referred to, but I assume that the notices given were sufficient. It appears, then, that both in September and in October the ship was a day behind the date of which notice was given, and this failure to keep time led to the loss of the loading berth, for which she had to wait three days. In September, for instance, notice having been given for the 18th, she came in on the 19th, and was immediately reported as ready to load, but did not get a turn for loading until the 22d September, because other vessels had been reported on the 18th and 19th September before the pursuers' vessel. The question therefore is, whether demurrage has been incurred, the ship being behind notice? This depends on the meaning of the stipulation about notice, and that must, I think, necessarily have reference to the relations of the parties and the circumstances of the trade for which the contract was made. The shipowners must be held to have known the regulations of Granton harbour, and that punctual arrival was of extreme importance where the accommodation was not quite equal to the number of vessels frequenting the harbour, and indeed, as has been pointed out, the pursuers, in their letter of September 29, speak of the miserable facilities for shipping at Granton. Accordingly, when the freighter enters into this charter-party binding him in demurrage, of which the natural risk certainly falls on the freighter, he stipulates for three days' notice of the time when the running days are to commence. The meaning of that is, that unless the ship comes up to time the freighter will not be liable to begin loading immediately. I am far from saying that the claim for demurrage would be absolutely discharged by unpunctuality in the arrival of the vessel, but the notice must be fairly given so that preparations for loading may be made. As regards the September voyage, notice is given in letters dated 14th and 15th September that the "Stentor" will reach Granton on the afternoon of Monday the 18th, and this is confirmed by telegrams on the 16th, but on the 18th the pursuers telegraph that the vessel, which was detained at Grangemouth for unexplained reasons, would not come till the morning of Tuesday the 19th, and, in fact, she did not arrive till 5·30 p.m. of that day. By this time, however, the "Gwendoline," the "Conatio," and the "Kelman" had been reported ready for loading, and had a preference for the crane-berth, which was required for coals. The "Stentor" did not get the berth till the 22d, on which day she was loaded without any delay. Now, I think, if the defender shews that had the vessel arrived in time she would have got a berth, this is just the case which the stipulation for notice was intended to cover. The case of the October voyage I consider even clearer than that of September.

Lord Ormidale—I concur. There are two points to be attended to here—(1st) that the demurrage, if incurred, was to be counted by the hours; (2d) that the freighter stipulated for three days' notice. These two things must be considered together in measuring the rights of parties. I do not say that three days' notice of the very hour at which the ship will be ready for loading or discharge is required, but I think the freighter is at least entitled to three days' notice of the day of arrival. There was a positive undertaking to give definite notice, and as regards the September voyage there was no notice given—nothing but hypothetical and contradictory announcements, which were worse than no notice, for they might lead to preparation which mightbe altogether useless. There was no delay on the part of the defenders in loading, and therefore there is no claim for demurrage. I cannot concur with the Lord Ordinary's view of the clause in the charter party excepting certain delays from the running hours. I think that clause would cover such hindrances as are disclosed here, and which were beyond the control of the freighters.

Lord Gifford—I concur, though I am not sure that the pursuers are not entitled to a proportion of the demurrage they claim in respect of the October voyage; but I do not propose to differ from your Lordships, as the pecuniary result is not much affected. The questions raised are special questions on this charter-party and the practice of this harbour, which we must suppose to have been known to both the contracting parties. The owner undertakes to give three days' notice. It might be longer—eight days notice would not be objectionable—but the undertaking is to be there on a certain day. The time was absolutely essential to the shippers, for they might have to put out the coal at their mine and arrange for its carriage by rail to the harbour against a certain hour, so as to avoid the claim of demurrage. Without punctual arrival these arrangements might be rendered abortive. The claim to demurrage is excluded so far by the failure to give proper notice. I do not think that the risk of overcrowding is covered by the clause in the charter-party; and with regard to the October voyage, I think that had the "Stentor" been in time she might have begun to load on the Monday morning, and the "Tyr" would have had no preference.

The Court adhered.

Counsel for Pursuers—Guthrie Smith—Kirkpatrick. Agents—T. & W. A. M'Laren, W.S.

Counsel for Defenders — Asher — Mackay. Agents—Campbell & Smith, S.S.C.