Counsel for Pursuer—Blackburn, K.C.—Chree. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for Defender—Clyde, K.C.—Fleming, K.C. — Macmillan. Agents—Dundas & Wilson, C.S.

HOUSE OF LORDS.

Wednesday, April 6.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, and Lord Shaw of Dunfermline.)

GLASGOW NAVIGATION COMPANY, LIMITED *v.* IRON ORE COMPANY, LIMITED.

(*Ante* July 20, 1909, 46 S.L.R. 908, and 1909 S.C. 1414.)

Process—Hypothetical Case—Competency—Appeal to House of Lords—Waiver by Parties of Clause in Contract upon which Action Raised.

Prior to raising an action to recover a certain sum as demurrage the solicitors for the parties, the shipowners and the charterers, agreed that a clause in the charter-party—"It is agreed that all liability of the charterers shall cease as soon as the cargo is shipped, notwithstanding that it may have been sold at a price to cover cost, freight, and insurance, in consideration of the vessel having a lien upon same for all unpaid freight, dead freight, and demurrage which she is hereby bound to exercise"—should be waived. The action proceeded on this footing, and was appealed to the House of Lords.

Their Lordships, on the ground that parties had concurred in asking for an order upon the footing that they were bound by a contract different from the contract by which they were actually bound, *dismissed* the action with expenses to neither party.

This case is reported *ante ut supra.*

The pursuers, the Glasgow Navigation Company, Limited, appealed to the House of Lords.

Their Lordships drew attention to the cessor clause in the charter-party quoted *supra* in rubric, which the parties, as appeared from the correspondence, had agreed to waive if the action was brought in the Sheriff Court, and asked for an explanation of such waiver.

Counsel for the pursuers (Mr BAILHACHE) stated—Before the action was begun the shipowner for whom I appear was not in a position to know who was liable for this demurrage. The bill of lading was sent, as your Lordships will see by the letter from Messrs Kinghorn & Company, who were the agents of the defenders in this case, the charterers, to Messrs Hamilton & Son, who were the agents both for the ship and for the Dalmellington Company, but we did not know whether the bill of lading had been endorsed over to or handed over to the Dalmellington Company, so that the Dalmellington Company took delivery under the bill of lading and were the holders of the bill of lading. Whether that was the position or not depended entirely upon the contract for the sale of this ore. At that time we were not in a position to call for the contract of course. We could not ask for the contract until this litigation began and we got discovery. Under those circumstances we communicated with the charterers and said—"There is a cessor clause in your charter-party. We do not know whether you are the owners of the cargo and the holders of the bill of lading, or whether the Dalmellington Company are the holders of the bill of lading. Will you undertake the obligations for demurrage although there is a cessor clause in the charter-party?" The charterers at once said they would, and attached the condition to it that the proceedings should take place in Scotland. Now when we came to see the contract (and it is necessary I should refer your Lordships to it) we found there was nothing at all in this waiver point, that the charterers remained liable because the contract is for delivery "free on rail Ayr." Under a contract for delivery "free on rail Ayr," the charterer who undertakes delivery does not pass the bill of lading to the receiver, the Dalmellington Company, and if we had known the facts it would not have been necessary for us to have approached the charterers in this case at all, because although there is a cessor clause in the charter-party, yet by reason of their being at the time of delivery the holders of the bill of lading, they became liable *qua* holders of the bill of lading.

LORD CHANCELLOR—Very well. Now where is the bill of lading? It was never given in evidence in the case at all.

Mr BAILHACHE—No, it was not.

LORD CHANCELLOR—Why not?

Mr BAILHACHE—I cannot tell your Lordship why it was not. I was not in the case in Scotland.

LORD CHANCELLOR—Was there only one copy of the bill of lading?

Mr BAILHACHE—There was only one copy.

LORD CHANCELLOR — What happened to it?

Mr BAILHACHE—We have it here.

LORD CHANCELLOR—Why was it not put in in process?

Mr BAILHACHE—The bill of lading, as your Lordship sees by the letter to which I have referred, was sent first of all to Messrs Hamilton & Son. Then the bill of lading came into the hands of the defenders' solicitors, and was sent at some time to us to inspect, and we still have it.

LORD CHANCELLOR—Why did not you put it in in process?

Mr BAILHACHE—In view of the arrangement that had been come to with the charterers, it was not necessary to refer to the bill of lading, because the charterers

having waived the cessor clause and the action being against the charterers, the bill of lading became immaterial.

LORD ATKINSON—You sue upon your charter-party, and when the document upon which you rely is produced it is found you have no cause of action, but by agreement you have agreed to delete the paragraph in the charter-party which takes away your cause of action.

Mr BAILHACHE—That is so.

At delivering judgment—

LORD CHANCELLOR—This was an action brought on a charter-party, and when the charter-party is looked at it contains a cessor clause. It now appears that the parties agreed that if the action were tried in Scotland the cessor clause should not be relied upon. In other words, as the case was stated and as the argument was founded, the bill of lading if material was not produced at all or put in process, and the Court was asked to decide, not upon a contract actually made, but upon a contract which never was made, although the result might or might not have been the same had the real facts been brought before the Court.

Now it is not the function of a court of law to advise parties as to what would be their rights under a hypothetical state of facts, but it is to decide what were their rights upon the real facts when the real facts are placed before the Court.

I do not suggest or suppose anyone would suggest that there was any impropriety intended by the parties to this arrangement; but what they have done is that they have placed the Court in the position that they are asked to decide, without the facts being all before them, upon a waiver of part of the contract, whereas if the waiver had not taken place, from all that appears on the face of the document there would have been no ground of action at all. I have no doubt, from the correspondence which has been sent to us, and from the statement which has been made, that this was arranged between the solicitors to the two parties, and thereby what in real substance was a feigned issue has been presented to the House.

Under those circumstances I think there is nothing to be done except to dismiss this action altogether, and I suggest to your Lordships that the following Order should be made—It appearing to their Lordships that the pursuers and the defenders concurred in asking for an Order upon the footing that they were bound by a contract different from the contract by which they were actually bound, the House declines to make any other Order than that this action be dismissed, and no expenses be allowed to either side.

LORD ATKINSON—I concur.

LORD SHAW—I also concur.

Their Lordships dismissed the action, with expenses to neither party, either in the House of Lords or in the Courts below.

Counsel for the Appellants (Pursuers)—Bailhache, K.C.—Sandeman. Agents—J. & J. Ross, W.S., Edinburgh—Holman, Birdwood, & Company, London.

Counsel for the Respondents (Defenders)—Morten, K.C.—Heale, K.C.—M. P. Fraser. Agents—Galbraith & Macpherson, Glasgow—Macpherson & Mackay, S.S.C., Edinburgh—Morten, Cutler, & Company, London.

Friday, April 8.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lord James, Lord Atkinson, Lord Collins, and Lord Shaw.)

LANARKSHIRE COUNTY COUNCIL *v.* AIRDRIE MAGISTRATES.

LANARKSHIRE COUNTY COUNCIL *v.* COATBRIDGE MAGISTRATES.

(*Ante* July 9, 1907, 44 S.L.R. 915.)

River—Rivers Pollution Prevention Acts—Burgh—County Council—Defences—Relevancy—Rivers Pollution Prevention Act 1876 (39 *and* 40 *Vict. cap.* 75), *secs.* 3, 8, 20; 1893 (56 *and* 57 *Vict. cap.* 31), *sec.* 1.

In a petition under the Rivers Pollution Prevention Acts to have the magistrates of certain burghs ordained to abstain from "causing to fall or flow, or knowingly permitting to fall or flow or to be carried, into certain streams any solid or liquid sewage matter, *held* that it was irrelevant to aver in defence that the streams were so polluted as to be merely sewers into which it could not possibly be an offence to put sewage.

These cases are reported *ante ut supra.*

The Magistrates of Airdrie and the Magistrates of Coatbridge appealed to the House of Lords.

At the conclusion of the appellants' argument—

LORD CHANCELLOR—This argument has the merit of singularity and also of ingenuity but I think it is one of the most hopeless arguments I have heard for a considerable time.

The Rivers Pollution Act of 1876 prohibits the pouring of sewage into streams. It defines "streams" so as to include all water-courses except "water-courses at the passing of this Act" (namely 1876) "mainly used as sewers emptying directly into the sea or tidal waters." The obvious policy and the obvious effect of the Act is to stop the pouring of foul water into a stream, but it excuses this being done in certain circumstances, as, for example, if it was being done as long ago as 1876, and the best practicable means are now used to render it harmless.

It is difficult to think of a simpler Act or one more clearly expressed. The Act states that you must not foul a stream except under particular conditions. Now undoubtedly and admittedly the now appel-