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*Feb'y. 23.

*June 18.

PATRICK GEORGE CARVILL, GEORGE McKEAN AND GEORGE T. CARVILL, (DEFENDANTS)..... } APPELLANTS;

AND

GEORGE A. SCHOFIELD, THOMAS GILBERT AND JAMES NEVIS, (PLAIFTIFFS)..... ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Charter Party—Damage to ship—Unavoidable delay—Refusal of charterers to load—Action by shipowners.

By a charter party of December 11th, 1878, it was agreed that plaintiff's vessel, then on her way to *Shelburne, N.S.*, should proceed

*PRESENT.—Sir William J. Ritchie, Knight, C. J., and Strong, Fournier, Henry and Taschereau, JJ.

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with all possible despatch, after her arrival at *Shelburne*, to *St. John*, and there load from the charterers a cargo of deals for *Liverpool;* and if the vessel did not arrive at *Shelburne* on or before 1st of January, 1879, the charterers were to be at liberty to cancel the charter party. The vessel arrived at *Shelburne* in December, and sailed at once for *St. John.* At the entrance of the harbor of *St. John* she got upon the rocks and was so badly damaged that it became necessary to put her on the blocks for repairs. Although she was repaired with all possible despatch, she was not ready to receive her cargo until 21st of April following, prior to which time—on 26th March—the charterers gave the owners notice that they would not furnish a cargo for her. The owners sued for breach of the charter party, and on the trial defendants gave evidence, subject to objection, that freights between *St. John* and *Liverpool* were usually much higher in winter than in summer; that lumber would depreciate in value by being wintered over at *St. John*, and also as to the relative value of lumber during the winter and in the spring in the *Liverpool* market; and it was contended that the time occupied in repairing the damage was unreasonable and had entirely frustrated the object of the voyage. The judge directed the jury that if the time occupied in getting the vessel off the rocks and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the shipowners and charterers, they should find for the defendants. The verdict being for the defendants, the court below made absolute a rule for a new trial.

On appeal to the Supreme Court of *Canada*, it was

Held (affirming the judgment of the court *a quo*), that as there was no condition precedent in the charter that the ship should be at *St. John* at any fixed date, and as the time taken in repairing the damage was not unreasonable, and the delay did not entirely frustrate the object of the voyage, the charterers were not justified in refusing to carry out the contract.

APPEAL from judgment of the Supreme Court of *New Brunswick* (1) making absolute a rule for new trial.

This was an action brought by the respondents, owners of a vessel called the "*Venice*," against the charterers (appellants) for a breach of the charter party in refusing to load her.

(1) 21 N. B. R. 553.

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Plaintiffs, owners of the ship *Venice*, agreed with defendants by charter party dated 11th December, 1878, that the *Venice* should proceed with all possible despatch after arrival at *Shelburne*, *N. S.*, to *St. John*, *N. B.*, or so near thereunto as she may safely get, and there load from the charterers, their agents or assigns, a full and complete cargo (including deck load, if lawful and desired by the master), to consist of deals and battens, &c., and being so loaded should therewith proceed to *Liverpool*, *Great Britain*, discharging same and delivering same on being paid freight as follows:

Should vessel not arrive at *Shelburne* on or before 1st January, 1879, charterers to have the privilege of cancelling this charter by giving Mr. *Schofield* notice to that effect next day; otherwise this charter to remain in full force and effect.

Freight payable on deals, battens, and other sawn lumber on the intake measure of quantity delivered, and measuring charges, if any, to be borne by the charterer.

Cargo to be delivered alongside at *St. John*, *N. B.*, at shippers' risk and expense.

(The act of God and rulers, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever, during the said voyage, always mutually excepted).

Cargo to be furnished at *St. John*, *N. B.*, as fast as required by master, and twelve running days are to be allowed the merchant (if the ship be not sooner despatched) for discharging cargo.

The declaration alleged that:

The plaintiffs did all things necessary on their part to entitle them to have the agreed cargo loaded on board the said ship therein at *St. John* aforesaid, and that the time for so doing has elapsed, yet the defendants made default in loading the agreed cargo, and the plaintiffs claim ($2,000) two thousand dollars.

Defendants pleaded a number of pleas *inter alia*:

3. That the defendants were prevented from loading the said vessel by perils of the sea, which rendered the said ship or vessel unable to perform her intended voyage within a reasonable time after the making of the said charter party, and the said agreed voyage was rendered impossible and its object wholly frustrated.

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7. That the said ship or vessel was so damaged and injured by perils of the sea as to be wholly unfit to perform the voyage intended by said charter party, and so long a space of time elapsed before she was repaired and ready to proceed on her said voyage that all benefit and advantage from said intended voyage was wholly lost to the said defendants, whereby the said defendants were released from the performance of their agreements in said charter party contained.

9. That the said ship or vessel was by perils of the sea prevented from receiving her said intended cargo, and from proceeding on her said voyage for so long a time that the said intended cargo was becoming injured and damaged, and the said defendants were compelled, in order to prevent such damage, to ship the said cargo by another vessel; and the said defendants lost all benefit and advantage from said intended voyage, whereby they were discharged from the performance of their agreements in said charter party contained.

10. That the said ship or vessel was by perils of the seas prevented from receiving her said intended cargo, and from proceeding on her said voyage for so long a time that defendants were compelled to remove said intended cargo from where it was stored, whereby they lost all advantage from said intended voyage; whereby they became released from the performance of their agreement in said charter party contained.

Vessel arrived at *St. John* about 19th December, got on rocks at mouth of harbour, and was not in a condition to receive cargo. The owners proceeded with all reasonable despatch to repair the vessel, but on the 26th March, her repairs not then being completed, the plaintiff addressed the following letter to the agent of the ship:

St. John, N. B., 26th March, 1879.

S. Schofield, Esq., City.

DEAR SIR,—In consequence of the great delay in the performance of your part of the charter of the barquentine *Venice*, chartered by you to us under date 11th December, 1878, we hereby give you notice that we cannot supply cargo to said vessel, and consider the charter null and void.

Your truly,

(Signed), p. pro. *Carvill, McKean & Co.*,
R. A. Macintyre.

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St. John, N. B., 26th March, 1879.

Messrs. *Carvill, McKean & Co., St. John.*

DEAR SIRS,—In reply to your letter of this date, I have to inform you that there has been no delay in regard to the *Venice*, except what was the unavoidable result of her getting on shore in *Courtenay Bay*, in December last. She is yet undergoing repairs of the damage sustained at the time referred to, but as soon as the same are completed and the vessel is ready for loading, I shall notify you and demand the cargo which you agreed to ship by her.

In the meantime, I beg to inform you that I claim that the charter party made between us, and dated 11th December, 1878, is still in force and will continue to be so, until it is fulfilled or cancelled by mutual consent of both parties.

Yours truly, *S. Schofield.*

St. John, N.B., 21st April, 1879.

Messrs. *Carvill, McKean & Co., St. John:*

DEAR SIR,—You will please take notice that the barquentine *Venice*, 625 tons register, is now fully repaired again, and in a loading berth at *Walker's* wharf, ready to receive and load the cargo for which she was chartered to you as per charter party, dated 11th December, 1878.

The cargo will be required at the rate of forty standard per day, commencing at once.

Yours truly,

Adolf Beryman, Master. *S. Schofield*, Agent for Owners.

Defendants did not load the vessel; she was not ready to receive cargo until this demand was made.

Mr. *Gilbert* and Mr. *Millidge* for appellants:

The voyage contemplated and for which the *Venice* was chartered was a voyage carrying acargo of deals from *Saint John* to *Liverpool*, and there is an implied contract that she will commence that voyage within a reasonable time, which is not filled by a delay of nearly four months. And had there not been the clause excepting the perils of the seas, the charterers would have been entitled to an action against the owners for not being ready to take the cargo within a reasonable time. It is true they are protected by the clause excepting the perils of the seas, but this clause is a

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mutual agreement and enures to the benefit of both parties. The effect of it is as if the charterer had said to the ship owner, "you have agreed to have your vessel ready to take in a cargo within a reasonable time, but if any of the excepted perils occur you will be released from the performance of your agreement by reason of such perils." And on the other hand it is a declaration or agreement made by the owner to the charterer: "you have agreed to provide and load on board my ship a cargo to be ready on her arrival, but if by reason of any of the excepted perils I am unable to have my vessel ready to take your cargo within a reasonable time you will be released from the performance of your agreement to provide a cargo for my vessel, or in other words, if any of these contingencies against which we have provided occurs, we are mutually discharged from our agreements and the contract is at an end." It is a fair construction of the agreement that by making the excepting clause mutual the intention of both parties must have been that in the event of the contingencies provided against occurring, both parties should be discharged from the performance of their several agreements, the one from carrying a cargo, the other from providing a cargo to be carried.

Assuming that the defendants are incorrect in their claim that the word mutual in the excepting clause enures to their benefit, on what principle is the contract to be construed?

It is scarcely within the range of probability that the idea that the vessel having arrived safely at *Shelburne*, within a day or two's voyage of *Saint John*, should have been wrecked and so damaged as to require four months to repair, ever entered into the contemplation of either of the parties to the contract. And it is not within the range of possibility that if it had occurred to them, that the defendants knowing the advantage of

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having their deals delivered at *Liverpool* in winter or early spring, knowing that the freight they were to pay was exceptionally high, and knowing that they were bound to clear their deals from where stored before the first of April, would have agreed that in case of such an accident the plaintiffs should have four months, or as much longer as might be necessary, to repair their vessel and still hold them bound to provide a cargo for her and at so exceptionally high rate of freight, or that the plaintiffs would have bound themselves to repair the vessel, no matter how great the damage short of total loss, at no matter how long it might take, as quick as possible, and hold her ready for the defendants to load, no matter what changes might take place in the freight market. The only reasonable provision any sane man on either side would have made, had such a contingency been presented to them, would be that in case of such a contingency occurring both parties should be discharged from the contract, and free to act as they deemed best.

The questions whether the delay was so unreasonable as to frustrate the whole object of the contemplated voyage, and whether the time of getting the ship repaired was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the ship owners and the charterers, are questions of fact and not of law, were raised by the pleadings and fairly left by the learned judge (who tried the case) to the jury, and found by them in the affirmative.

The cases relied upon were the following: *Geipel* v. *Smith* (1); *Jackson* v. *Union Marine Insurance Co.* (2); *Dahl* v. *Nelson* (3); *Rankin* v. *Potter* (4).

Mr. *Weldon*, Q.C., for respondents:

In the case of *Jackson* v. *Union Marine Insurance Co.* the

(1) L. R. 7 Q. B. 404.
(2) L. R. 8 C. P. 572, 10 C. P. 125.
(3) 6 App. Cases 38.
(4) L. R. 6 H. L. 83.

jury found: 1. A constructive total loss of the ship, which however, was not approved of by the court, and the case was argued without that element in it; 2. That the time nesessary for getting the ship off and repairing her so as to be a cargo carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time; and 3. That the time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and charterers; or, in other words, that the object of the voyage as contemplated and understood by the shipowner as well as the charterers—that a specific cargo for a specific purpose should be carried from *Newport* to *San Francisco*, and where time was essential, was wholly frustrated.

But in this case the object of the voyage was not wholly frustrated. The mere speculation as to the rise and fall of the market, or of freight, or the ordinarily better state of a market at a particular time, is not the object of the voyage as contemplated between the parties, or the risk of which the shipowner agrees to run.

The case falls within the principle of the following cases:—*Tarrabochia* v. *Hickie* (1); *Hurst* v. *Osborne* (2); *McAndrew* v. *Chappell* (3); *Chipsham* v. *Vertue* (4); *Jones* v. *Holm* (5). See also the case of *Dimeck* v. *Corlett* (6).

RITCHIE, C. J.:

The defendants' contention on this appeal is that the object of chartering was to have the cargo carried in winter, but that when the vessel was ready to receive cargo the time for a winter voyage had expired.

The only evidence we have in reference to a winter

(1) 1 H. & N. 183.
(2) 18 C. B. 144.
(3) L. R. 1. C. P. 643.
(4) 5 Q. B. 265.
(5) L. R. 2 Ex. 335.
(6) 12 Moore P. C. 199.

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voyage, or the difference between a winter and a spring or summer voyage, is as follows:

George McKean.—We entered into the charter party on 11th December; freights were high then. Cargo was ready on 1st January, 1879. It was lying at *Miller & Woodman's* mill. I left *St. John* in February, 1879, for *England.* The vessel was not ready to receive the cargo before I left; had she been offered up to that time, I was ready with cargo to load her.

Q.—What would be the effect on the commercial value of that cargo of keeping it until April 21 for shipment? A.—The cargo would be deteriorated by the action of the weather, and it would have had to be removed, as we were bound to clear the wharf for *Miller & Woodman.* We had bought the deals from *Miller & Woodman,* and agreed to clear the wharf to allow them to commence sawing by 1st April.

Q.—What would be the difference in value in *Liverpool* on those deals between the 1st February and 1st May? A.—They had fallen in price fully 10s. a standard.

Q.—Is there any special advantage to the charterer to send to *Liverpool* a winter cargo as against a cargo arriving in the late spring or early summer? A.—There is a very special advantage, because this is the only open port in the winter, and the cargo therefore will arrive on a bare market. Cargo arriving during the winter season can be sold from the quay, thus avoiding storage. Cargo leaving here in April will sometimes get in before cargo from gulf ports. Large number of ships from *Miramichi* and gulf ports get away by middle of May; but great part leave about 1st June.

Robert A. McIntyre.—Q. What would be the effect on the commercial value of that cargo, of keeping it until 21st April for shipment? A.—The deals get stained, and thus depreciate in value; and new deals being mixed together, the cargo will not sell as well.

Q.—Is there any advantage to the shipper in sending forward an early winter cargo of deals from *St. John* to *Liverpool,* as against a similar cargo shipped as soon as she could possibly load on and after 21st April? A.—I have been in *Liverpool,* but I have no personal knowledge of the deal trade, except what I have got from correspondence papers.

Witness: A cargo shipped in winter is much more valuable than one in spring, because it goes in free from competition from other ports, and it is generally sold on arrival free from all stowage charges.

This evidence does not show that there is such a

substantial difference between a winter and a spring voyage for deals from *St. John* to *Liverpool*, that while the one may reasonably be undertaken as a mercantile speculation, the other could only be a mercantile failure? On the contrary, the advantages put forward of a winter voyage from *St. John*, are that winter voyages from that port are exceptional, by reason of the open harbour of *St. John*, and that such voyages do not come into competition with the usual spring or summer voyages from other deal ports which are closed by ice in winter. Therefore, if a cargo from *St. John*, shipped in contemplation of arriving in *Liverpool* in the winter, does not reach that port until the spring, the voyage is not lost, the cargo is still at its destination in the due course of the deal trade, though possibly not under quite as favorable circumstances as if it had arrived earlier, and therefore is wholly unlike a fruit cargo or ice cargo, or a cargo to be delivered for a certain specific purpose, when the benefits of the voyage are entirely lost by delay.

Nothing whatever is said in the charter party of a winter voyage, nor is any time fixed within which the ship shall be ready to load and sail from *St. John*. I do not think there is any sufficient evidence to justify the conclusion that in entering into this charter both parties understood and agreed that it was confined to a winter voyage. Had such been the intention, it should have been so expressed in the charter party, and there is no implied contract that I can discover as to when the vessel should be ready to commence the voyage. The fact that it was stipulated that the vessel should be at *Shelburne* by a certain day, or, if not, that the charterers might elect to cancel the charter, would indicate that to this extent time was deemed of importance, and the charterers thus secured that in due course and without accident the ship would reach *St. John* and be in a posi-

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tion to take in cargo promptly; but the absence of any stipulation fixing the time when she should reach *St. John*, and be ready to load, would, in like manner, appear to indicate that if the vessel arrived at *Shelburne* within the time limited and proceeded from thence to *St. John* with all reasonable despatch, each party took upon themselves the risk of her arrival at *St. John* and of the period when she would be in a position to receive cargo and ready to sail. The parties not having expressly provided that unless the vessel was loaded and ready to sail by a specified day the charter party would be at an end, as was said in *Dimeck* v. *Corlett* (1), "Courts ought to be slow to make such a stipulation for them." I think the question in this case is, was the delay so great as to destroy the voyage or merely to retard it?

To enable a charterer to put an end to the contract, the delay must be such as frustrates the object of voyage; in other words, the voyage both parties contemplated must have become impossible. In this case the time necessary to get the ship repaired so as to be a cargo carrying ship was not, in my opinion, so long as to put an end, in a commercial sense, to the commercial speculation entered into by the ship owners and charterers; a voyage, undertaken after the ship had been sufficiently repaired would not, in my opinion, have been a different voyage, either as to the port of loading and discharge, or a different adventure. I cannot discover anything to justify the conclusion that these charterers contemplated a winter voyage so as necessarily to raise an implied condition that the ship should be ready in time to receive the cargo for such a voyage, and so to make it a condition precedent, whereby, she not being so ready, the contract was put an end to.

The question therefore is: Did the voyage, by reason

(1) 12 Moo. P. C. 227.

of the time lost, or delay caused by this accident, become a different voyage from that agreed for. In other words, did the delay deprive the charterers of the whole benefit of the contract, or entirely frustrate the object of the charterer in chartering the ship? If so, it is an answer to an action, for not loading the cargo (1). But if the vessel was in a condition to be repaired, and it is evident she was, the repairing having been done with all reasonable despatch, the delay was nothing more than a temporary obstruction to the voyage, which did not enable either party to put an end to the contract. Had freights in the meantime largely risen, the ship owners could not, in my opinion, when the ship was repaired and ready to take in cargo on the 21st April, have refused to receive cargo from the charterers if offered on that day. If the liability to carry continued, the liability to ship likewise necessarily continued.

The observations of *Bovill*, C. J., in *Jackson* v. *Union Marine Insurance Co.* (2), strike me as so peculiarly applicable to this case, that I may be pardoned quoting them at length :

> Upon a charter party where the charterer does not stipulate for the arrival of the vessel by any particular date, the risk of her non-arrival, by reason of weather and the accidents of navigation, always rests with the charterer; and, where the stipulation is simply that the ship will proceed to the loading port with all convenient speed, the dangers of the sea excepted, the ship owner performs his part of the contract, and there is no breach of it by him, if without his default the arrival of the vessel is delayed only by the accidents and dangers of the sea, even although that delay may prevent the loading of the vessel at the usual time, or so as to be profitable to the charterer.
>
> The law has no power to make a contract different from that which a person has entered into; and, where a shipowner does not agree that his vessel shall arrive at the loading port by any particular day,

(1) *MacAndrew* v. *Chapple*, L. R. 1 C. P. 643.

(2) L. R. 8 C. P. 585.

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but only that she shall proceed there with all convenient speed, or, what the law would imply, that she shall proceed and arrive within a reasonable time, and expressly stipulates that this shall be subject to the dangers and accidents of the seas and navigation, I do not see how that exception is to be got rid of, or how a contract with such an exception can properly be construed as, or converted into, an absolute engagement on his part that his vessel shall proceed or arrive within a reasonable time, as if there were no exception. If the contract could be so treated, it must be equally open to the shipowner to put an end to it, and this in some cases might be productive of the greatest inconvenience to the charterer.

I quite admit the great inconvenience and possible loss to both shipowner and charterer, when any serious delay is caused by the necessity for heavy repairs arising from sea perils; but the answer to such an argument, as it seems to me, is, that, if either party desires to protect himself from such risk or inconvenience, he should introduce stipulations into the contract with that object; and if, instead of doing so, both parties agree that the vessel is to proceed and load subject to the accidents of navigation, which they expressly except, I think it is not competent for either of them afterwards to claim to be absolved from his contract by reason of an accident of navigation which he has expressly agreed shall be excepted.

I am of opinion this appeal should be dismissed.

STRONG, J.:

I have had an opportunity of reading the judgment of the Chief Justice, and I entirely concur in his reasons given in this case.

FOURNIER, J., concurred.

HENRY, J.:

At the first blush of this case I was rather of the opinion that under the peculiar circumstances presented by the evidence, it was of importance that the provision that the vessel should be at *Shelburne* at a particular time (which is distant only a day or two sail from *St. John*) was intended and understood by the parties to be a provision made to ensure reaching the winter markets by the shipping of the cargo at an early date.

There is very little doubt on my mind that that was the intention of the parties, and that it was perfectly understood by them both; that the high price they agreed to pay for freight, which is higher in winter than in summer, and which the party is enabled to pay by the advantages which he secures by getting his lumber into *Liverpool* before the spring trade opens, which is shown to be of very great importance by the evidence fully shows this. And he who does not ship in time not only loses largely in price but loses also in the accommodation that he would otherwise receive in the docks at *Liverpool*. Taking these all together, I have no difficulty in coming to the conclusion that that was what the parties meant and understood, but then, as the learned Chief Justice has very well said, have they put that into their agreement? The words "in reasonable time, dangers of the sea only excepted," only required the parties to be at the place when they possibly could under the exception, and if the shipowner is prevented by accident in navigation from arriving at port within what would otherwise be reasonable time, that may be set up as a reasonable excuse. There is no doubt there are exceptions to that rule in the case of ice and other perishable articles, where it is understood that the voyage is to be made at a certain season and the cargo would otherwise be useless. Fruit and ice come within that classification, and I thought at first that under the peculiar circumstances of this case, it might be brought under the rule applicable to them, but I find that it is not so, according to the agreement. The decisions all go to show that the parties must provide for it in the contract. That is not done here, and I am of the opinion that the appeal should be dismissed. There is a case, however—*Jackson* v. *The Union Marine Ins. Co.* (1)—

(1) L. R. 8 C. P. 585.

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which is a case of a shipment of iron. There the vessel was on her way to receive the iron, when she was wrecked. She was damaged in such a way that it took some time to repair her, and the parties suggested in one of their letters that time was of importance to them, because the rails were wanted for a railway about to be put in operation. There was no proof of that fact, however, given, and if that case really could be taken as law governing such transactions, then I would have felt bound to have given the benefit of that decision to the charterers in this case. I find, however, that is rather an exception, and that it is not in accordance with the general rule of law laid down as governing the contract. I must, therefore, reluctantly come to the conclusion that the contract was still in force when the owners of the ship offered her services to the charterers, and at the time when they refused to furnish a cargo.

TASCHEREAU, J.:

I have come to the same conclusion, for the same reasons as the learned Chief Justice,—to dismiss this appeal. I think it is better to adhere to the rule that if parties wish to protect themselves against accidents of this kind, they should say so in their contracts.

GWYNNE, J., concurred.

Appeal dismissed with costs.

Solicitors for appellants: *G. G. Gilbert.*

Solicitors for respondents: *Weldon & McLean.*