[HOUSE OF LORDS.]

WILLIAM POSTLETHWAITE . . . . APPELLANT;

AND

JOHN FREELAND AND ALEXANDER FREELAND . . . . . } RESPONDENTS.

H. L. (E.)
1880
May 7, 10, 11; *June* 7.

Charterer—Discharging Cargo, Means for.

The duty of providing, and making proper use of, sufficient means for the discharge of a cargo, when a ship, which has been chartered, arrives at its destination, and is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charterparty, and by the circumstances of the case. If, by the terms of the charterparty, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part, to discharge the cargo within a reasonable time.

Per LORD HATHERLEY:—When the covenant merely engages that the merchant shall with all dispatch, according to the custom of the port, unload the vessel, he will fulfil his contract if he employs all the usual methods of dispatch at the port.

A charterparty was entered into by which a vessel was to take on board a cargo of steel rails and fastenings, and proceed therewith to the port of *East London*, in *South Africa*. In the charterparty was this stipulation: "The cargo is to be discharged with all dispatch according to the custom of the port." The discharge of such a cargo could only be effected there by a warp and lighters. These were under the absolute control of a company, to which the Governmental authorities had transferred all their powers. The company allowed vessels the use of the warp and lighters in turn, making no exception in favour of any vessel except mail steamers, which on arriving were provided for to the exclusion of other vessels, whether of the Government or of private individuals. The ship arrived at the port, found a great number of vessels there, the number of lighters was insufficient, and the ship could not obtain its "turn" until more than thirty-one working days had elapsed after its arrival. There was no delay attributable to the master or crew except what was thus occasioned by the custom of the port:—

Held, that in this case the shipowner was not entitled to maintain an action against the charterer for demurrage.

THE Plaintiff (the now Appellant) was managing owner of the ship *Cumberland Lassie*. The Defendants were merchants who entered by charterparty into a contract with him by which the ship was to proceed to *Barrow-in-Furness*, and there load a cargo of

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370 tons of steel rails and fastenings, with which it was to proceed to *East London, Cape of Good Hope*, "to discharge at any safe wharf, where ships can always lie safely afloat . . . the cargo to be brought to, and taken from alongside, at merchant's risk and expense." The lying-days for loading were provided for, and demurrage for delay beyond those lying-days was to be £5 per day. On arrival at the port of discharge the stipulation was, "The cargo is to be discharged with all dispatch, according to the custom of the port." The ship arrived off *East London* on the 31st of August, 1875. *East London* is a bar harbour, and a vessel of the burden of the *Cumberland Lassie* could not cross the bar until a considerable part of its cargo was discharged. The ship brought up at the usual place of discharge, about a mile outside the bar, on the 1st of September, 1875, being quite ready to discharge cargo as soon as the means and the custom of the port permitted. When ships arrived at *East London*, and required to discharge cargo, the course was this:—The Colonial Government authorities had formerly exercised complete control over the discharge of cargoes from vessels arriving there. Those vessels lay outside the harbour, and were discharged by means of lighters which, by manual labour, were worked upon a warp and wire. The Colonial Government had, some time since, transferred all its interest and authority in discharging the cargoes of vessels arriving at the port, to a company called the "*East London Landing and Shipping Company.*" All vessels arriving at the port lay outside the harbour till they could use the warp and the lighters employed by the company. Those lighters were worked by manual labour upon a warp, which was itself inside the harbour, but was connected with buoys outside the harbour. The company had only four lighters fit to carry rails, and these and all the other means for discharging cargo were under the absolute control of the *East London Company*. By the regulations of that company each ship arriving at the port was to be discharged in turn, except mail steamers, in favour of which all other vessels were to give way; but as to all other vessels, even if they were Government vessels, no interference on the part of the Government was allowed. When the *Cumberland Lassie* arrived off the port of *East London* there were many other vessels (several with similar

cargoes) already in the port, and entitled by the existing regulations to precedence in the use of the warp and the lighters. The consequence was that the *Cumberland Lassie*, though the master was fully prepared to discharge his cargo, and was anxious to do so, lay idle off the bar from the 31st of August to the 6th of October. On the 6th of October he was allowed to take his turn, and there was no complaint as to delay from that day until the discharge of the cargo. The action was brought to recover the sum of £215 for demurrage in respect of the delay between the 31st of August and the 6th of October. The stipulation in the charterparty, it was contended for the Plaintiff, made the Defendants liable for the delay in discharging the cargo, while for the Defendants it was insisted that, under the circumstances which existed here, the provision for discharging "according to the custom of the port," exempted the Defendants from any liability for a delay which that custom itself had occasioned. The cause was tried before Lord *Coleridge* and a special jury, on the 12th of March, 1878, when his Lordship put the following questions to the jury: 1. Was there any settled practice or custom between the months of April and November, 1875, as to the unloading of sailing vessels, laden as the *Cumberland Lassie* was laden, in the port of *East London?* 2. If there was, was the *Cumberland Lassie* unloaded with all dispatch according to that custom? 3. If there was no settled practice, was the *Cumberland Lassie* unloaded with all dispatch under the circumstances? The jury found the first two questions in the affirmative, the third therefore became immaterial. The verdict, on these findings, was ordered to be entered for the Defendants. A rule for a new trial was obtained, and, after argument, discharged. The case was taken to the Court of Appeal, and was heard by Lords Justices *Brett*, *Cotton*, and *Thesiger*, when Lords Justices *Brett* and *Thesiger* were of opinion that the appeal should be dismissed. Lord Justice *Cotton* dissented (1). The appeal was then brought.

Mr. *Butt*, Q.C., and Mr. *Cohen*, Q.C. (Mr. *Bigham* was with them), for the Appellant:—

It is the clear duty of the charterer of a vessel to take all

(1) 4 Ex. Div. 155.

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proper means to discharge the cargo, and if he fails to do so he becomes liable for the delay thus occasioned. That principle was laid down in express terms by Lord *Ellenborough* in *Randall* v. *Lynch* (1). In that case forty days were allowed by the charter-party for unloading, but the time taken was thirty-one days beyond that period, and the delay was attributed to the crowded state of the *London Docks* at that time. Lord *Ellenborough* said, "The question is whether the detention of the ship, arising from the inability of the *London Dock Company* to discharge her, is, in point of law, imputable to the freighter; I am of opinion that the person who hires a vessel, detains her, if, at the end of the stipulated time, he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so." His Lordship treated the dock company as the freighter's agents for the delivery of the cargo, and declared that the freighter was "as much responsible for a delay arising from the want of a berth, as if it had arisen from tempestuous weather or any other cause." In that case, therefore, the rule was expressed which was in all respects applicable here. The crowded state of the docks, and even the happening of tempestuous weather, were declared not to exempt the freighter from his general liability to procure the speedy discharge of the vessel. In *Ford* v. *Cotesworth* (2) that principle was adopted, and Mr. Justice *Blackburn* said (3): "We agree that whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances. And if some unforeseen cause, over which he has no control, prevents him from performing what he has undertaken within that time, he is responsible for the damage." That principle had been adopted in *Wright* v. *The New Zealand Shipping Company* (4), so that circumstances not within the control of the freighter were held not to excuse him. The principle was, that the duty to discharge

(1) 2 Camp. 352, 355. See 12 East, 178. See also *Rodgers* v. *Forresters*, 2 Camp. 483, and *Burmester* v. *Hodgson*, 2 Camp. 488.

(2) Law Rep. 4 Q. B. 127; affirmed, 5 Q. B. 545.

(3) Law Rep. 4 Q. B. at p. 133.

(4) 4 Ex. Div. 165, n.

depended on him, and if he did not make special covenants as to any interference with the performance of that duty, he must be held liable. The distinction which was taken in the present case by the Lord Chief Baron (1) that "Lord *Ellenborough* was speaking there of the duties of charterers under a charterparty which limited the time for discharging, not in respect of a charterparty containing such words as occur here, which are, that the vessel is to be discharged 'with all dispatch according to the custom of the port'" could not be sustained. [LORD BLACKBURN:—If he accepted the lighters sent and they were not sufficient, would that render the freighter liable?] It would; it was his duty to provide sufficient means for discharging the cargo, and he must be taken to know the customs and mode of business of the port, and to be prepared accordingly. In *Ashcroft* v. *The Crow Orchard Colliery Company* (2) the Defendants, who had undertaken "to load with the usual dispatch of the port," or to pay 40*s.* a day demurrage, were held liable, though there were regulations at the loading dock prohibiting any persons from having more than three vessels loading at the crane at any one time, and so interfered with the progress of the work. In that case *Tapscott* v. *Balfour* (3) had been relied on as shewing that the lay-days commenced only from the time when the ship was admitted into the dock, which would have had the effect of relieving the charterer, but the Court of Queen's Bench did not adopt that construction of the charterparty, but described the stipulation "as a contract by the charterer that he will load with the usual dispatch, and it is no answer to say that he was unable to do so." In *Adams* v. *The Royal Mail Steam Packet Company* (4) the charterer agreed to load a vessel, on arriving at *Cardiff*, with a cargo of coals, in the customary manner; the loading did not take place as agreed, and in an action for demurrage the delay was held not to be excused by a strike among the colliers and a dispute with a railway company along whose lines the coals were to be brought, for that these matters, though beyond the control of the charterer, had not been contemplated by either party when the charterparty was made,

(1) Printed Appendix, p. 123.
(2) Law Rep. 9 Q. B. 540.
(3) Law Rep. 8 C. P. 46.
(4) 5 C. B. (N.S.) 492; 28 L. J. (C.P.) 33.

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and therefore the general rule that the loading must take place within a reasonable time was adhered to. Here, the merchant was bound to have sufficient lighters ready at all events. *Cunningham* v. *Dunn* (1) did not at all affect the general rule of the duty of the charterer, for there both parties knew of the Spanish Government's regulation which would prevent the shipment of the cargo, and an application had been made to the Government to relax it, which application was refused, and therefore it was the common fault of both that the ship was dispatched to make the attempt. [LORD BLACKBURN referred to *Moir* v. *The Royal Exchange Assurance Company* (2).] In *Davies* v. *McVeagh* (3) Lord Justice *Bramwell* states the principle to be deduced from all the cases in these terms: "When a ship is to take on board cargo at a specified place of loading, the responsibility rests, not with her owner, but with the charterer, if the specified berth is not in a fit state to receive her upon her arrival at the appointed time." Of course the same principle applies to unloading as well as to loading a vessel. *Erichsen* v. *Barkworth* (4) was also referred to. In *Thiis* v. *Byers* (5) the principles now contended for were adopted and acted upon. Even where the charterparty allowed a given number of days to the charterer, it was held that in such a case the law implied a contract, on his part, that from the time when the ship was at the usual place of discharge, he would take the risk of any ordinary vicissitudes which might occur to prevent his releasing the ship at the expiration of the lay-days. And *Nelson* v. *Dahl* (6) laid down the rule that when the shipowner had brought the ship as near to the place of discharge as it could safely get, damages for the delay which afterwards occurred in not getting it a berth must fall on the charterer. The principle to be be applied to this case was clear, and there was nothing to exempt the charterer from its operation.

Mr. *Watkin Williams*, Q.C., and Mr. *J. W. McLeod*, for the Respondents:—

It is not necessary to dispute the general propositions contended

(1) 3 C. P. D. 443.
(2) 3 M. & S. 461.
(3) 4 Ex. D. 265.
(4) 3 H. & N. 601, 894.
(5) 1 Q. B. D. 244.
(6) 12 Ch. D. 568.

for on the other side. Where nothing is expressed of course there may be different things implied, but where the contract distinctly entered into between the parties does express precisely what is to be done, no mere implications can affect that contract. It is true that in this case there is a stipulation that the "cargo is to be discharged with all dispatch," but those words are immediately qualified by the added words, "according to the custom of the port." The charterer in terms undertook the duty which the numerous cases referred to were said, by implication, to cast on him, and he qualified the assumption of that duty by words which freed him from its strict observance, if circumstances beyond his control, namely, the custom of the port, rendered him incapable of discharging it. Both parties knew the meaning of these words and agreed to them. And the facts of the case shew that everything which it was in the power of the charterer to do was done, and that in no way whatever did the fault of the delay rest with him. Nor was the delay caused by anything over which he could possibly exercise any control. Under the very words of the contract, therefore, he is free from all responsibility. The charterer was within the principle laid down in *Taylor* v. *Great Northern Railway Company* (1) where the defendant company, which had been prevented, by a stoppage of the line occasioned by the act of another company having running powers over the line, from delivering the plaintiff's goods within a reasonable time, was held to be exempted from responsibility. *Thiis* v. *Byers* (2) was not unfavourable to the Respondents, for the cause of the delay there was the ordinary occurrence of bad weather, the risk of which might well be supposed to be undertaken by the charterer. But here was an obstacle to unloading, arising from a custom of the port quite beyond the power of the charterer to prevent or to remedy, which must be taken to have been known to both parties, and as to which by the very terms of the contract he was agreed to be freed from all responsibility.

Mr. *Cohen*, in reply.

(1) Law Rep. 1 C. P. 385.

(2) 1 Q. B. D. 244.

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THE LORD CHANCELLOR (Lord *Selborne*) :—

My Lords, the question in this case is, whether demurrage is payable for delay in discharging a cargo of steel rails at the port of *East London* in *South Africa*, under the following circumstances: By the charterparty, the Appellant's ship *Cumberland Lassie* was to take on board at *Barrow-in-Furness*, and to deliver at *East London*, "at any safe wharf where ships can always lie safely afloat, as ordered on arrival, or so near thereto as he" (*i.e.* the master) "can safely get," the cargo in question, which was "to be brought to and taken from alongside at merchant's risk and expense," and "to be discharged with all dispatch according to the custom of the port." For the loading at *Barrow* a fixed number of days was agreed upon, with demurrage at a fixed rate if that time was exceeded.

East London is a port with a bar at its entrance, over which ships heavily laden (as this ship was) cannot pass till they are lightened by the discharge of great part of their cargo. This is done by means of lighters propelled by manual labour along a main rope or warp, running from a quay inside the harbour, across the bar, to a buoy outside, from which they are hauled to the ship's side by means of branch warps. The main warp, and the whole supply of lighters at the port, were in the hands and under the management of the Colonial Government till 1873, when they were transferred by the Government to a company called the *East London Landing and Shipping Company*. It is stated in the Appellant's case that "prior to 1873 the warp had been the property of the Colonial Government, but in that year it was taken over by the company." Mr. *Jameson*, a director of the company, gave evidence to the effect that in 1875, and for some time afterwards, they had a control over the use of the warp; and this is consistent with other parts of the evidence, particularly where it is stated in the Appendix that, when the company had once begun the discharge of a vessel, they "would not allow" any interference, even by the Government surf-boats; and that "when the Government" (which seems to have reserved to itself some sort of concurrent right with the company) "had commenced the discharge of a ship they acted in the same way." The company in 1875 had nine lighters, of which only seven

were in working order, and only four were fit to discharge such a cargo as that of the *Cumberland Lassie*, at the time when that ship arrived. The Government had usually two, and appears to have brought in three more about that time, or soon afterwards, from *Port Elizabeth* in *Algoa Bay*, more than 150 miles off, which was the nearest port where any additional lighters could have been obtained. The rails on board the *Cumberland Lassie* were shipped on account of the Crown agents in the colony; but I do not find in the evidence any proof that, consistently with the usage of the port (as already described), any of the Government lighters were, or could have been made, available for the discharge of this particular cargo, by any arrangements within the charterers' power. When (as happened on the arrival of this ship, and as seems to have usually happened at the same time of the year) there were more ships lying off the bar than the lighters in the port could simultaneously discharge, every ship was discharged in turn, according to the order of its arrival, as reported at the port office; one lighter per diem being sent to it on every working day, till the ship could cross the bar. If no lighter was ready, suitable for the particular cargo, the ship might lose its turn for the day; which, however, did not happen in this particular case.

There were twenty-four working days during which the *Cumberland Lassie* lay idle off the bar at *East London*, from the 31st of August to the 6th of October, 1875, ready (as far as the master was concerned) to discharge the cargo, but prevented from doing so by the priority in the use of the warp, and of the lighters then available at the port, allowed by the custom of the port to ships which had previously arrived there. This ship's turn came on the 6th of October; and no complaint is made of any subsequent delay. The question before your Lordships is, whether demurrage is payable for detention there during those twenty-four working days? At the trial before Lord *Coleridge*, a verdict was given for the Defendants, the charterers, under the direction of that learned Judge. A rule *nisi* was obtained for a new trial; but this, after argument, was discharged by the Lord Chief Baron and Mr. Justice *Hawkins*, sitting as a Divisional Court. Their judgment was affirmed by a majority (Lords Justices *Brett* and *Thesiger*) in the Court of Appeal; Lord Justice *Cotton* dissenting. The appeal

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to your Lordships is from that decision, and my opinion is that the judgment appealed from ought to be affirmed.

There is no doubt that the duty of providing, and making proper use of, sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If, by the terms of the charterparty, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time; that is (as was said by Mr. Justice *Blackburn*, in *Ford* v. *Cotesworth* (1), "a reasonable time under the circumstances." Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence, ought (I think) to be taken into consideration.

These distinctions are well illustrated by three cases in *Campbell's* Reports, which were referred to in the arguments at your Lordships' Bar. In *Randall* v. *Lynch* (2), the charterer was held liable for demurrage, a particular time being fixed by the charterparty for the discharge of the cargo. In *Rodgers* v. *Forresters* (3) (where the contract was to discharge the ship "within the usual and customary time for unloading such a cargo"), and in *Burmester* v. *Hodgson* (4) (where the Court thought this to be the contract which the law ought to imply from the terms of the charterparty), the charterer was held not liable for demurrage. In all those three cases the circumstances which caused the detention of

(1) Law Rep. 4 Q. B. 127; 5 Q. B. 544.
(2) 2 Camp. 352; 12 East, 179.
(3) 2 Camp. 483.
(4) 2 Camp. 488.

the ships were the same, viz., the crowded state of the *London Docks*, in which the ships were, by Act of Parliament, obliged to unload.

If your Lordships should agree that the present appeal ought to be dismissed, you will, I think, be adhering to the principle of *Rodgers* v. *Forresters* (1) and *Burmester* v. *Hodgson* (2), which does not appear to me to be inconsistent with that of the later authorities. Two recent cases were much relied upon in the argument of the Appellant's counsel at your Lordships' Bar: *Ford* v. *Cotesworth* (3) and *Wright* v. *The New Zealand Shipping Company* (4). That of *Ford* v. *Cotesworth* (3) is, I think, perfectly consistent with the earlier cases. The judgment of the Court of Error turned upon a *vis major*, which the Court held to have impeded the master of the ship, as well as the agent of the charterer, from performing his part in the discharge of the vessel. But at the trial the jury was told by the Lord Chief Justice of *England* (in my opinion correctly, nor do I perceive that the Court of Error thought otherwise) that "the question whether the time was reasonable or unreasonable ought to be judged with reference to the means and facilities available at the port, and to the facilities and course of business at the port." In the other case (*Wright* v. *The New Zealand Shipping Company, Limited* (4), which is at first sight much more favourable to the Appellant, there were special circumstances on which the decision might very well have been founded, but to which (as it does not appear to me to have been, in fact, founded upon them) I do not more particularly refer. The distinctions between that case and the present (whether the doctrine laid down in it can be supported, or not), are, that there no express reference was made in the contract to the custom of the port, and that, if such a reference ought to have been implied, no custom or other circumstances existed, which would have made it impossible for the charterer, by the use of reasonable diligence, to provide himself with lighters for the discharge of the cargo earlier than he did. What the Lords Justices in that case held was (in Lord Justice *Cotton's* words) that "an

(1) 2 Camp. 483.
(2) Ibid. 488.
(3) Law Rep. 4 Q. B. 127; 5 Q. B. 544.
(4) 4 Ex. D. 165, n.

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obligation was imposed upon the charterer of providing at the port of discharge sufficient appliances of the kind ordinarily used at the port;" and it was expressly added that he would not have been bound to provide appliances which were not in use there, but which might be in use at other ports.

In the present case it appears to me to be the true result of the evidence that the *Cumberland Lassie* was discharged "with all dispatch according to the custom of the port." In the construction of this contract, I think that the words "according to the custom," &c. ought to be read in connexion with the word "dispatch." Looking at the natural conditions and the rules of the port, its distance from any other port, the necessity for the use of the warp, and the control over the warp possessed by the *East London Landing and Shipping Company*, I do not think that the insufficiency of the number of lighters available to discharge simultaneously all the ships lying outside the bar of *East London*, when the *Cumberland Lassie* arrived there, can be regarded as an impediment to the due discharge of that ship, collateral to or separable from the custom and practice of the port, against which the charterers ought to have provided, or for which they ought (as between themselves and the shipowner) to be held responsible.

I, therefore, propose to your Lordships to dismiss the present appeal with costs.

LORD HATHERLEY:—

The Appellant was the owner of the ship called the *Cumberland Lassie*, and as such chartered her to the Respondents, the *Freelands*, by a charterparty dated the 28th day of April, 1875.

The ship was to proceed to *Barrow-in-Furness*, and to take on board a cargo of steel rails and fastenings, and to proceed to *East London* (*Cape of Good Hope*) "to discharge at any safe wharf where ships can always lie safely afloat as ordered on arrival, or as near thereunto as she can safely get, and there deliver the same."

The document contained the following provisions:—"The cargo to be brought to, and taken from alongside at merchants' risk and expense." "Twelve running days, Sundays and holidays excepted, are to be allowed the merchants, if the ship is not sooner

dispatched for loading the cargo as above, any days on demurrage over and above the said lying-days at £5 per day."

"The cargo is to be discharged with all dispatch according to the custom of the port."

Now the facts proved in evidence are, that *East London* is a bar harbour, requiring great care and attention in unloading vessels, because they cannot safely carry on the operation until the vessel to be unloaded has been lightened of a great part of its cargo by means of lighters, which are guided across the reef into the harbour, by a process of warping along a hawser taken over the reef to which other ropes are fastened. The supply of lighters appears to be scarcely adequate to the need, when there are many ships to be attended to, and it is in evidence that in the autumn months, when there are sometimes (as was the case in this instance) thirteen ships to be attended to, Mr. *Walker*, a retired harbour-master, says that three months would be required for discharging a ship of the size and laden with a cargo like the *Cumberland Lassie*. This scarcity of lighters seems to arise from a practical monopoly of the lighters and the warping-rope, the business of unloading having been conducted by the Government originally, but afterwards by a company, which bought the concern from the Government.

As a consequence of the supply of lighters not being adequate to the discharge of all vessels as they arrive, there has arisen a custom, or rather usage, of the port by which any vessel arriving is marked for its turn according to the arrival, but with a preference to Government mail steamers.

It appears that the *Cumberland Lassie* was unloaded in the usual way, and that the days occupied, including those in which it had to wait for its turn (being the days in question in this suit), were not more than the number of days usually occupied during the period of the year by vessels of its size and burden.

It appears to me from the evidence and the cases cited at the Bar, that the charterers (the Respondents) have not been in any default in respect to the engagements entered into on their part in the charterparty, viz., "to discharge the ship with all dispatch according to the custom of the port."

The cases shew that when a specific time is named, either in

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words or by necessary implication, the party who has contracted to unload a ship within the time must bear the loss occasioned by any excess of time, although the delay was not occasioned by any default on his part; for, as was said by Lord *Tenterden* in his work on Shipping (in a passage quoted by Mr. Justice *Blackburn* in delivering the judgment of the Court of Queen's Bench in *Ford* v. *Cotesworth* (1)), "he has engaged that it shall be done." But all that is engaged to be done here "is to proceed with all dispatch according to the custom of the port." Such an engagement might not, perhaps, excuse the merchant from the consequences of any unusual accident arising to delay the discharge of the vessel beyond the customary time of discharge: see *Barker* v. *Hodgson* (2), cited also in *Ford* v. *Cotesworth* (1), because the merchant has contracted that the discharge shall take place within a given time, viz., that of the usual period for discharge of a like vessel in that particular port, and the shipowner is entitled to have his ship back at the expiration of that time or to be paid demurrage, whatever be the cause of delay. But when the contract merely engages that the merchant shall with all dispatch, according to the custom of the port, unload the vessel, he will be, as it appears to me, fulfilling his contract if he employs all the usual methods of dispatch, and especially the warps and lighters usually so employed, and especially also, when, in fact, a dispatch was obtained as great as in the case of any other ship of the same size and burden.

I do not think that the merchant has engaged that he will use any other means of dispatch than those used habitually at the port. It is suggested that he should have taken care that the supply of lighters should be adequate without delay to attend to his ship; but this would be to adopt a course which there is no evidence that anybody frequenting the port ever adopted. So far is that from being the case that no ship is shewn ever to have adopted any other course than that which was used by the Defendants, nor has the argument suggested any usual course as having been omitted by the merchant, which will also be a course coinciding with the usage of the port. Any other course would be outside the contract, and if it failed, as it probably might when

(1) Law Rep. 4 Q. B. 136. (2) 3 M. & S. 269.

adopted for the first time, the consequent result would be a breach of the existing contract to which the demurrage might be attributed. The course taken as to turns seems to me part of the usage. I agree, therefore, with the Lord Chancellor that the appeal should be dismissed with costs.

LORD BLACKBURN:—

My Lords, the question in this case, in my mind, depends on what, on the true construction of the ordinary clause in a charterparty, "the cargo to be brought to and taken from alongside at merchant's risk and expense," is the extent of the implied undertaking on the part of the merchant to provide lighters or other appliances for taking the cargo from alongside. The parties to the charterparty may, by any stipulations they please, alter the undertaking which would otherwise be implied; but in the charterparty now before this House I think they have not done so. The only other reference to the discharge of cargo is, "the cargo is to be discharged with all dispatch according to the custom of the port." I do not think that this alters the question, as the express reference to the custom of the port of discharge is no more than would be implied. For I take it that a charterparty in which there are stipulations as to loading or discharging cargo in a port, is always to be construed as made with reference to the custom of the port of loading or discharge, as the case may be. See *Hudson* v. *Ede* (1), though it was expressly found in that case that the shipowner and his broker were not aware of the usage. In the case of *Wright* v. *New Zealand Company* (2), the Judges of Appeal were of opinion, as *Bramwell*, L.J., expresses it, that the merchants were bound "to have lighters ready to discharge her forthwith, and were not entitled to excuse the omission on the ground that at the port of discharge there was only a certain number of lighters, and when the Plaintiff's vessel arrived, other ships belonging to other persons required those lighters, and the Defendants got lighters for unloading the cargo as soon as they could. To my mind," says he, "those circumstances afford no answer to the

(1) Law Rep. 2 Q. B. 566; affirmed, L. R. 3 Q. B. 412.
(2) Law Rep. 4 Ex. D. 165, n.

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Plaintiff's complaint; the Defendants having undertaken to unload the vessel were bound to be ready to do it, and to finish it within a reasonable time." And the other members of the Court express the same idea.

I think that if the true construction of the clause, "cargo to be brought to and taken alongside at merchant's risk and expense," is that the merchant undertakes to be ready with lighters to discharge the vessel, the subsequent clause inserted in this charterparty for the shipowner's benefit that "the cargo is to be discharged with all dispatch according to the custom of the port," could not have been intended to relieve him from that undertaking. But the question now to be decided, as I think, is, whether there is an undertaking to that extent.

The facts which are sufficient to raise the question in the present case are few, and are not in dispute. By the charterparty between the Plaintiff, as managing owner of the *Cumberland Lassie*, and the Defendant, the ship was to proceed to *Barrow-in-Furness*, and there load a cargo of steel rails and fastenings, "and being so loaded shall therewith proceed to *East London, Cape of Good Hope*, to discharge at any safe wharf where ship can always lie safely afloat, as ordered on arrival, or so near thereunto as she can safely get, and there deliver the same, on being paid freight as follows." * * "The cargo to be brought to and taken from alongside at merchant's risk and expense."

"Twelve running days, Sundays and holidays excepted, are to be allowed the said merchants (if the ship is not sooner dispatched) for loading the cargo as above. Any days on demurrage over and above the said lying-days at five pounds per day. The cargo is to be discharged with all dispatch according to the custom of the port."

The ship sailed with the cargo on board, and arrived off *East London* on the 31st of August, 1875. *East London* is a bar harbour, and a vessel of the burthen of the ship in question could not cross that bar until a considerable part of the cargo was discharged; and it is not disputed that the *Cumberland Lassie* brought up at the usual place of discharge, about a mile outside the bar, and was there on the 1st of September, 1875, and there remained with the captain and crew ready to do their part in

discharging the cargo as soon as any lighter came alongside. No lighter came alongside till the 6th of October. The Plaintiffs the shipowners can in no way be considered the authors of this delay, which, *primâ facie* at least, was an unreasonable time to keep the ship waiting for lighters; and the question seems to me to be whether the merchants are to be considered the authors of this delay, or, in other words, whether they, the Respondents, shewed a sufficient excuse for this delay. The facts proved seem to be not disputed.

It appears that the Colonial Government had laid down a warp, which was anchored inside the bar in the river, and carried across the bar and anchored outside to a buoy; and this warp had been made over to a company called the *East London Shipping and Landing Company*. The lighters in use at the port are decked boats fitted with two horns, and by placing the warp between these horns and along the deck the crew of the lighter are enabled to warp the vessel out across the bar to the buoy outside.

From the buoy the lighter is taken to the ship, being hauled either by lines sent from the ship, or, sometimes, by tugs. The loaded lighter is bought back to the buoy, and then warped back over the bar. Lighters cannot be thus taken across the bar by means of the warp except when the weather permitted it to be used. But between the 1st of September and the 6th of October there were twenty-five days in which the warp could be worked.

The company had only four lighters there fit to carry rails; the government authorities there, who were the consignees of the railway iron, obtained three more; so that there were seven in all; and it is not in dispute that, as far as concerned the use of the warp, more lighters could have been utilized if they had been there. There were waiting for discharge thirteen ships which had arrived before the *Cumberland Lassie*. The seven available lighters were appropriated to the ships in turn as they had arrived, and the *Cumberland Lassie* did not get her turn till so many of those thirteen were discharged as to set a lighter free.

The discharge of the ships previously in port was proceeded with as rapidly as was possible with that limited number of lighters. But if there had been either fewer ships waiting, or more lighters available, this ship would not have been kept so long. There was

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evidence that the number of ships was unusually great, owing to the fact that the railway material was then being discharged.

The counsel for the Appellants did not, at your Lordships' bar, think it necessary or desirable to enter farther into the facts, as, if the delay in beginning to unload was not excused, the verdict for the Defendant ought not to stand.

The case came on for trial on the 13th of March, 1878, before Lord *Coleridge* and a special jury. The jurors were told, and I think quite correctly, that "custom" in the charterparty did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port, and it was then left to them to say whether there was such an established custom, and if the *Cumberland Lassie* was unloaded with all dispatch under the circumstances. And in leaving this to the jury he told them in effect that they were to take into account the circumstances as they were, though the number of ships was unusually great, and the number of available lighters fewer than could have been worked by the warp. I should observe that it appears to be clear that no lighters could have been obtained from any other port in a less time than was occupied in discharging the ships that had arrived before the *Cumberland Lassie;* so that no question was raised as to whether, if there had been such, the merchant ought to have obtained them. The only question raised on the facts was that on which Lord *Coleridge* thus directed the jury. It is not disputed that if the direction was right, the verdict for the Defendant was justified. It seems to me clear that if the view of the law afterwards laid down by *Bramwell* and *Cotton*, L.JJ., and, I am inclined to think, as reported, by *Thesiger*, L.J., also, in *Wright* v. *New Zealand Company* (1), is correct, this was a misdirection.

The present cause was brought before the Court of Appeal, then consisting of *Brett*, *Cotton*, and *Thesiger*, L.JJ., shortly after that Court, then consisting of *Bramwell*, *Cotton*, and *Thesiger*, L.JJ., had given judgment in *Wright* v. *New Zealand Company* (1). *Cotton*, L.J., adhered to the view of the law he had taken in that case, and thought there should be a new trial. *Thesiger*, L.J., distinguished the cases, not to my mind successfully, and thought

(1) 4 Ex. Div. 165, n.

the direction in the present case right; and as *Brett*, L.J., agreed with him, judgment was given for the Defendant. The appeal is against that judgment.

As the two decisions—that in the present case and in *Wright* v. *New Zealand Company* (1)—were almost contemporaneous, and were on applications for new trials in cases tried at the same assizes, and almost contemporaneously, I think this must be treated as an appeal from both these cases; so that your Lordships have the opinions of *Bramwell* and *Cotton*, L.JJ., on one side, and *Brett* and *Thesiger*, L.JJ., on the other,—a balance of authority as nearly equal as could well be. It is very singular, considering how long charterparties having a clause in this form have been in use, that there should be no direct authority on the subject; but so it is. At least the counsel at your Lordships' bar were able to cite none, and I have not been able myself to discover any. It is almost as singular that the question should at last have been raised in two cases almost at the same time, and that the Court of Appeal should be equally divided in opinion. I think your Lordships must decide on analogy to other cases, and on general principles of law; and though I have felt, and still feel, that there is a great deal to be said in favour of the view of the law taken by those Judges who are in favour of the Appellants, I have come to the conclusion that the ruling of Lord *Coleridge* and the judgment below were right, and that this appeal should be dismissed with costs.

As the merchant, if not himself resident at the port of discharge, at all events has a consignee and correspondent there resident, he presumably knows all about the means and appliances for discharging a ship there better than the shipowner. It, therefore, seems very reasonable that the shipowner in making his bargain should require the merchant to make an estimate of the probable time of discharging the ship, and take on himself the risk of that time being exceeded; and then the shipowner can fix the payment he is willing to take with reference to this; and this has long been done by providing lay days and demurrage days for the discharge.

In the last edition of *Abbott* on Shipping published while Lord

(1) 4 Ex. Div. 165, n.

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Tenterden was living, it is said (1), "The usual clauses purporting that it is covenanted and agreed by and between the parties that a specified number of days shall be allowed for loading and unloading, and that it shall be lawful to detain the vessel for those purposes a farther specified time on payment of a daily sum, constitute a contract on the part of the freighter that he will not detain the ship for those purposes beyond the two designated periods; and if he does so detain her, he is liable to an action on the contract, in the form adapted to the nature of the instrument. If a ship be so detained, the daily rate of demurrage mentioned in the charterparty will in general be the measure of the damages to be paid; but it is not the absolute or necessary measure; more or less may be payable as justice may require, regard being had to the expense and loss incurred by the owner; and the amount must be settled by a jury if the parties cannot agree. And where the time is thus expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action for damages if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, *for he has engaged that it shall be done.*" These last words are put in italics by Lord *Tenterden.* It still remains the more usual form of charterparty to insert lay-days and demurrage days. In many of the cases cited on the argument at the Bar the charterparties were of this nature, and the question only was whether the lay-days had begun to run. *Tapscott* v. *Balfour* (2) was of this nature; for though the charterparty did not name a specific number of days, it provided that the ship was "to be loaded by the Defendants at the rate of 100 tons per working day;" and as the burden of the ship was known, and *id certum est quod certum reddi potest,* this was equivalent to naming a certain number of days. No question could have been made, if there had been lay-days in the present charterparty, that they would have begun to run on the 1st of September.

Neither does *Thiis* v. *Byers* (3) bear on the present case. The Judges there say, "We took time to look into the authorities, and are of opinion that where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that

(1) 5th Ed. p. 180. (2) Law Rep. 8 C. P. 46.
(3) 1 Q. B. D. 244.

from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay-days." Had there been lay-days in this case, that would have had a bearing on the question whether the days on which the weather prevented lighters from crossing the bar were to be reckoned as lay-days or not. The parties can by express agreement prevent any dispute as to this, as was done in *Hudson* v. *Ede* (1), though, as that case shews, they may, unless they are cautious, produce results which they did not anticipate.

But, for whatever reason, the parties who framed the charter-party in this case, and that in the case of *Wright* v. *New Zealand Company* (2), did not choose to have lay days for the discharge of the vessel, and consequently it is left to the Court to say what is the contract implied by law, not qualified in any way in the charterparty in *Wright* v. *New Zealand Company* (2), and in the present case only qualified, if at all, by the provision that the cargo is to be discharged with all dispatch according to the custom of the port. The strongest argument in favour of the Appellants is, I think, this:—"Is not the freighter," says Lord *Ellenborough* in *Barker* v. *Hodgson* (3), "the adventurer who chalks out the voyage, and is to furnish, at all events, the subject-matter out of which the freight is to accrue." And on this principle it was held in that case, and has been held in several others, that there is an absolute contract on his part to furnish a cargo, and that he is bound to pay damages if it becomes impracticable to do so; though it would be otherwise if it became illegal to do so. The cases of *Adams* v. *Royal Mail Steam Company* (4), and *Kearon* v. *Pearson* (5), proceed on this principle. The parties may and often do provide by express qualification that strikes, quarantine, or other impediments shall excuse the merchant. And perhaps the same effect may be produced if it appear that the contract was framed with reference to any particular state of things: *Harris* v. *Dreesman* (6). I am not aware of any case

(1) Law Rep. 2 Q. B. 566.
(2) 4 Ex. D. 165, n.
(3) 3 M. & S. 267, at p. 270.
(4) 5 C. B. (N.S.) 492; 28 L. J. (C.P.) 33.
(5) 7 H. & N. 386.
(6) 23 L. J. (Ex.) 210.

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contradicting the doctrine that, in the absence of something to qualify it, the undertaking of the merchant to furnish a cargo is absolute. And if the obtaining lighters or other customary appliances for the discharge of a ship on its arrival was, like the procuring a cargo for loading the ship, a matter which fell entirely on the merchant, so that he might choose his own mode of fulfilling it, I am not prepared to say that on the same principle he ought not to be held to undertake, without qualification, to provide those appliances. And this seems to be the basis of the judgments of *Bramwell* and *Cotton*, L.JJ., and, as it rather seems to me of *Thesiger*, L.J., also, as then expressed, though he does not adhere now to that opinion, in *Wright* v. *New Zealand Company* (1), and of *Cotton*, L.J., in the case now at Bar. But I do not think that the undertaking to supply lighters or other appliances to assist in discharging the ship does fall within the same principle as the undertaking to supply a cargo. There is no case in which it has been held so to do; and, as far as I can find, there is nothing in any of the text-books in support of the doctrine that it does; and, as it seems to me, what authority there is (I agree it is not very direct), is against the position.

In *Rodgers* v. *Forresters* (2) the charterparty expressly stated that "the said freighter should be allowed the usual and customary time to unload the ship or vessel at her port of discharge." The facts appearing to be that the cargo, wines, was of such a nature that it was usual and customary to unload in a bonded warehouse, and that the delay in this particular case was owing to an unusual crowd of shipping in the docks, Lord *Ellenborough's* ruling was that the usual and customary time was that which would be taken to discharge into a bonded warehouse in the then state of the docks. In *Burmester* v. *Hodgson* (3), which came on before Chief Justice *Mansfield* three days afterwards, the point was still more clearly raised. There was no charterparty there, the question arising on a bill of lading, but as the Defendants were consignees of the whole cargo of brandies, that did not, I think, make any difference. The bill of lading was silent as to the period of discharge. It appeared that the ship entered the docks, and did not complete its discharge for sixty-three days.

(1) 4 Ex. D. 165, n. (2) 2 Camp. 483. (3) 2 Camp. 488.

It appeared, says the report, to be the invariable practice to bond cargoes of this sort. Even when the cargo is bonded, if the docks are not overcrowded, twenty or twenty-three days are a sufficient space of time for unloading.

In *Burmester* v. *Hodgson* (1) *Mansfield*, C.J., said, "Here the law could only raise an implied promise to do what was in *Rodgers* v. *Forresters* stipulated for by an express covenant; viz., to discharge the ship in the usual and customary time for unloading such a cargo. That has been rightly held to be the time within which a vessel can be unloaded in turn, into the bonded warehouses. Such time has not been exceeded by the Defendant. If the brandies were to be bonded they could not be unloaded sooner, and the Defendant seems to have been as anxious to receive, as the Plaintiff was to deliver them."

This was an express decision that the merchant was not responsible for the forty days' delay occasioned by the unusually crowded state of the docks. I cannot see on what principle the merchant can be responsible for the lighters being too few to unload the unusual number of ships, if he is not to be responsible for the dock being too small to unload the same unusual number.

In *Ford* v. *Cotesworth* (2), in error, it was held that the contract implied by law was not, as *Mansfield*, C.J., had held, a contract to discharge in the usual and customary time, but one that the merchant and shipowner should, each, use reasonable dispatch in performing his part. But this does not in the least affect the point for which the ruling in *Burmester* v. *Hodgson* (3) is in this case valuable,—that in considering what is reasonable dispatch under the circumstances, the number of ships there, though unusually large, is one of the circumstances to be taken into account. In *Taylor* v. *Great Northern Ry. Co.* (4) it was laid down that a "reasonable time" meant what was reasonable under the circumstances. *Byles*, J., there says, "My brother *Hayes* treats ordinary time and reasonable time as meaning the same thing; but I think reasonable time means a reasonable time, looking at all the circumstances of the case. The delay in this case was an accident, as far as the Defendants were concerned, entirely beyond their control, and therefore I think they are not liable."

(1) 2 Camp. 488, at p. 489.
(2) Law Rep. 4 Q. B. 127; 5 Q. B. 544.
(3) 2 Camp. 488.
(4) Law Rep. 1 C. P. 385.

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This is, I think, right, and applicable to the present case.

The only other case which it is necessary to notice is *Ashcroft* v. *Crow Orchard Colliery Company* (1). There the regulations of the docks, which were known to both parties, were, amongst others, "No coal agent to be allowed to load more than two flats at the cranes at the same time, nor to have more than three vessels at the docks loading and to load at the cranes at one time."

By the charterparty the vessel was to load in the docks: "to be loaded with the usual dispatch of the port."

The facts were that the Defendants acted as their own coal agents, and had at the time thirteen ships which had priority of the Plaintiffs; and the ship was in consequence kept outside the dock for thirty days after it was at the disposal of the Defendants, but before the dock company would admit it. The decision of the Court was that the contract was to load with the usual dispatch, and that this self-imposed inability on the part of the charterers to do so was no defence, even if the plaintiffs had known of it; which in fact they did not. I think this, which is probably right, has no bearing on the present case.

The result is, that I come to the conclusion that the ruling of Lord *Coleridge* was right, and that the appeal should be dismissed with costs. This is hard on the shipowner, who is in no default, and who probably never would have entered into a charterparty in those terms if he had thought he thereby incurred such a risk of delay. All that a Court of Law can do is to construe the contract as the parties have made it; so as to make it as clear as can be, what the legal effect of such a contract is. The parties can, by altering the terms of their contracts in future, avoid any inconvenience that arises from that construction. It is, no doubt, not an easy thing to introduce a new form of contract into mercantile use, but it can be done.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 7th June, 1880.

Solicitors for Appellant: *Parkers.*
Solicitors for Respondents: *Allin & Greenop.*

(1) Law Rep. 9 Q. B. 540.