QUEBEC ADMIRALTY DISTRICT

1924
Feb. 8.

KNOX BROS., LIMITED..................PLAINTIFF;

AGAINST

THE STEAMER *HEATHFIELD* AND OWNERS .... } DEFENDANTS.

Shipping—Charter-party—Discharging of cargo—"Default"—Delay fixed or ascertainable—Lay days—Demurrage—"Running days."

1. That the provision in a charter-party that the discharge of a cargo would be "at the rate of * * * feet per day," becomes, once the cargo is ascertained, an undertaking to complete the discharge within a fixed period of time, such period to be computed by days calculated at the rate fixed in the charter-party, and not by hours, and that where a fraction of a day was required for the completion of the discharge, the charterer is entitled to the whole of that day.
2. That where there is an undertaking to discharge the ship in a fixed period, such a provision is an absolute and unconditional undertaking by the charterer that the ship will be released at the expiration of the lay days, regardless of the difficulties and obstacles which might be met in the course of such discharge, and that the words "default of charterer" in the charter-party meant not merely default to receive the cargo, but generally an omission or neglect to perform the contract.
3. That "days" and "running days" in computing demurrage mean the same thing, in absence of some particular custom, and refer to calendar days, without excepting Sundays and holidays, and not any period of 24 hours; and in this case "lay days" being completed at midnight on the 13th June, 1923, and the unloading completed on the 18th at 11 p.m., the ship was entitled to five days demurrage.

ACTION for damage to cargo of lumber on voyage from Vancouver, B.C., and Portland, Ore., to Montreal, and counter-claim by defendant against plaintiff for $1,977.84 demurrage for detention of steamer beyond the lay days allowed under the charter-party.

Plaintiff's action was abandoned at trial and action proceeded only on the counter-claim.

8th, 9th, 10th January, 1924.

Case now heard before Honourable Mr. Justice Maclennan at Montreal.

C. A. Hale, K.C. for plaintiff.

A. R. Holden, K.C. and *R. Clement Holden* for defendants.

The facts are stated in the reasons for judgment.

MACLENNAN, L.J.A. now, February 8, 1924, delivered judgment.

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The plaintiff's action is for alleged damage to a cargo of lumber carried from Vancouver, B.C., and Portland, Ore., to Montreal, under the terms of a charter-party entered into at Montreal on 6th February, 1923, between plaintiff and the agents for the steamer *Heathfield* and her owners. The defendants in their defence deny responsibility for the alleged damage to the cargo and counter claim against plaintiff for $1,977.84, as demurrage for the detention of the steamer at the port of Montreal five days and two hours beyond the lay days allowed by the charter-party for the discharge of the cargo.

The steamer arrived in the port of Montreal at 9 a.m. on May 31, 1923, and the master immediately by letter notified plaintiff of the arrival and that the lay days for discharging the cargo would commence at 9 a.m. June 1. The discharge began at 1 p.m. on June 1 and was completed at 11 p.m. 18th June. By the terms of the charter-party the cargo was to be delivered by the vessel at the port of discharge at the vessel's rail, any custom to the the contrary notwithstanding, and in the order most convenient to the vessel. The charter-party contains the following provisions relative to loading, discharging and liability for demurrage:—

F. The party of the second part (charterers) shall be allowed for loading and discharging said vessel at the respective ports aforesaid, lay days as follows: Cargo to be supplied to vessel at loading place or places at the rate of two hundred and fifty thousand feet, board measure, each working lay day (Sundays and legal holidays excepted, unless otherwise agreed by mutual consent) ....
discharge to be given at the rate of four hundred thousand feet per day, at such safe wharf, dock or place as charterers or their agents shall designate.

For each and every day's detention by default of said party of the second part or their agents or receivers of cargo, demurrage shall be paid at the rate of sixpence (6d.) per net register ton per running day, day by day (before bills of lading are signed if at loading port, and before completion of delivery of cargo if at port of discharge) by said party of the second part or agents or receivers of cargo to said party of the first part or agents.

The plaintiff's answer to the claim for demurrage is, that the ship failed to discharge at the rate of 400,000 ft. per day as required by the charter-party and is alone responsible for any delay that may have occurred, and plaintiff was not liable for any demurrage charges whatsoever.

At the trial the plaintiff abandoned its action for damage which was accordingly dismissed. The defendants then put in their evidence on the counter claim and plaintiff examined its witnesses in support of its answer. The cargo was in part round logs and square timber and the balance material varying in thickness from one-half to three inches. The discharge was a joint operation, as the ship was obliged to deliver the cargo at the rail where the plaintiff, charterer, was obliged to receive it. The same firm of stevedores acted on behalf of the ship and plaintiff under a separate contract with each. The cargo was delivered over the rail into the water and not on the dock. Rafts were formed of the timber and lumber as delivery proceeded. The evidence shows that the mechanical appliances on board the ship were in good order and sufficient for the purposes of delivering the cargo and that the stevedores' workmen were competent and efficient. The discharge began at 1 p.m. on June 1. No work was done on June 3, 10 or 17 which were Sundays. June 4 was a legal holiday, the King's birthday, but the men worked the whole day. No agreement was made between the charterer and the master, or the ship's agents, that the King's birthday, although the men worked, should be counted as a lay day. There was some interruption of the work on June 8 on account of rain, the men working only a part of the forenoon. There was also interruption on account of rain on June 14, but on that day the defendants claim the lay days had expired and the ship was on demurrage. Work was suspended during the forenoon of 18th June on the order of the master. The ship had a lien on the cargo for demurrage and the discharging was suspended pending the receipt of a personal undertaking from the plaintiff for the ship's claim for demurrage. As soon as that undertaking was obtained the discharge was resumed and was completed at 11 p.m.

An important question in this case is, what was the nature and extent of plaintiff's engagement under the charter-party for detention of the ship beyond the time allowed for discharging the cargo? The claim for demurrage is in respect of the discharge and has nothing what-

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ever to do with the loading of the cargo. The discharge was to be at the rate of 400,000 feet per day, the bill of lading quantity was 3,805,260 ft. and, at the stipulated rate, should be discharged in 9·51 days, if a fraction of the last day is to be counted, but if not, 10 days. That was the delay stipulated for the discharge and the release of the ship.

In *Randall* v. *Lynch* (1), Lord Ellenborough said at page 355:—

> 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 them from doing so.

In *Barret* v. *Dutton* (2), *Gibbs* C.J., said, at p. 334:—

> There was an absolute undertaking by the freighter of this ship to load and discharge her in 30 days and whether it was or was not possible for him to do so from the state of the weather, is quite immaterial.

In *Thiis* v. *Byers* (3), Lush J., said:—

> 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, 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. This is the doctrine laid down by Lord Ellenborough in *Randall* v. *Lynch,* which was upheld by this court; and it has been accepted as the guiding principle ever since.

In the House of Lords, in 1880, in the case of *Postlethwaite* v. *Freeland* (4), Lord Selborne L.C., said:—

> There is no doubt that the duty of providing, and making proper use of, sufficient means for 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 charter-party, 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.

In the House of Lords, in 1919, in the case of *Alexander* v. *Aktieselskabet Dampskibet Hansa* (5), Viscount Finlay cited with approval the language used by Scrutton L.J., in

(1) [1809] 2 Campbell's Rep. 352.
(2) [1815] 4 Campbell's Rep. 333.
(3) [1876] L.R. 1 Q.B.D. 244 at p. 249.
(4) [1880] 5 A.C. 599 at p. 608.
(5) [1919] 88 L.J. P.C. 182.

his work upon charter-parties and bills of lading, Article 131 reading as follows:—

If by the terms of the charter the charterer has agreed to load or unload within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever be the nature of the impediments which prevent him from performing it, unless such impediments are covered by exceptions in the charter, or arise from the fault of the ship-owner or those for whom he is responsible.

The charter-party now under consideration provides for discharge at a rate per day which becomes, once the cargo is ascertained, an undertaking to complete the discharge in a fixed period of time regardless of the difficulties and obstacles which might be met during the course of the discharge. It is an absolute undertaking on the part of the plaintiff, as charterer, that the ship would be released and returned to her owners at the expiration of the lay days, subject to the obligation of paying demurrage for each and every day's detention at the rate of six pence per net registered ton per running day, day by day. The defendants claim demurrage from 13th June at 9 p.m. for five days and two hours at the rate specified in the charter-party. The net registered tonnage of the *Heathfield* is 3,198 tons and, at six pence per ton, would entitle the ship to claim 79 pounds 19 shillings per day, or, as the charter-party says, *per running day, day by day.* Lord Abinger, C.B., in *Brown* v. *Johnson* (1), said:—

I think the word *days* and *running days* means the same thing, viz: consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation, they must be expressed.

Lord Esher, M.R., in *Nielsen* v. *Wait* (2), after referring to the above observations of Lord Abinger, said:—

Running days comprehend every day including Sundays and holidays, and *running days* and *days* are the same.

Substantially the same language is to be found in MacLachlan's Law of Merchant Shipping, 6th edition, page 420, where it is stated that

in reckoning time under a stipulation for demurrage *days* and *running days* mean the same thing in the absence of any peculiar custom to the contrary, i.e., calendar days from midnight to midnight running consecutively, therefore without excepting holidays.

Carver's Carriage by Sea, 6th edition, page 740, says:—

The word *day* usually means day according to the calendar beginning and ending at midnight,

(1) [1842] 10 M. & W. 331 at p. 333.

(2) [1885] L.R. 16 Q.B.D. 67 at p. 73.

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and the author refers to *The Katy* (1), where the Court of Appeal held (affirming the President)

that *running days* meant calendar days and not any period of 24 hours.

Although the discharge of the cargo began at 1 p.m. on June 1, *The Katy* is authority for counting that day as one of the lay days. June 4th, the King's birthday, was a legal holiday excepted by the charter-party and, although the men worked, in the absence of any agreement or mutual consent to treat it as a lay day, it is not to be counted as such on the authority of the House of Lords in the case of *Nelson & Sons, Limited* v. *Nelson Line* (2). In *Houlder* v. *Weir* (3), Channell J. held that, where a fraction of a day is required to complete the time allowed for discharging, the charterer is entitled to a whole day, unless there are words in the charter-party indicating a different intention, and, on the principle laid down in that case, the plaintiff would be entitled to 10 days for the discharge of the cargo of the *Heathfield,* as there is nothing in the charter-party that fractions or parts of days are to enter into the computation of the time specified for loading or discharging the cargo. Excluding June 3 and 10, which were Sundays, and June 4, the King's birthday, the plaintiff would be entitled until midnight June 13 to complete the discharge, the ship would go on demurrage on the morning of June 14 and, as the discharge was complete at 11 p.m. on 18th June, the claim for demurrage would be for 5 days at the rate stipulated in the charter-party. There was no default on the part of the ship, her equipment was in good order and sufficient, her stevedores were the best that could be obtained and could have discharged the cargo within the delay fixed between the parties, which was exceeded on account of the time it took the plaintiff's stevedores to build the rafts and remove the cargo after it reached the vessel's rail, where the ship's responsibility ended.

The plaintiff submitted that it would only be liable in the event of

detention by default of said party of the second part,

that is, by some default on the part of plaintiff to receive

(1) [1894] 71 L.T. 709.
(2) [1908] A.C. 108; 77 L.J.K.B. 456.
(3) [1905] 2 K.B. 267.

the cargo. In the case of *Burrill* v. *Crossman* (1), it was held by the Circuit Court of Appeals that,

where the charter-party provides that demurrage should be payable for each day of detention by default of the charterers or their agents, the word *default* means an omission or neglect to perform the contract.

See also Stephens Law relating to Demurrage, page 70.

The plaintiff undertook to release the ship within a definite fixed delay. It did not do so, it omitted or neglected to perform its contract and therefore the detention of the ship beyond the stipulated time was by reason of the plaintiff's default within the meaning of that expression in the charter-party.

The stipulated rate of demurrage amounts to 79 pounds 19 shillings per day, and for five days amounts to 399 pounds and 15 shillings, equivalent in Canadian currency at the rate of exchange on 18th June, 1923, to the sum of $1,889.81.

There will therefore be judgment on the counter-claim in favour of defendants against plaintiff for $1,889.81, with interest and costs.

Solicitors for plaintiff: *Messrs. Laverty, Hale & Dixon.*

Solicitors for defendants: *Messrs. Meredith, Holden, Hague Shaughnessy & Heward.*