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*Mar. 16-18.
*April. 27.

THE MIDLAND NAVIGATION COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE DOMINION ELEVATOR COMPANY (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Shipping—Time limit for loading—Loading at port—Custom—Obligation of charterer.

A ship, by the terms of the charter, was to load grain at Fort William before noon of December 5th.

Held, per Taschereau C.J. and Davies J., Girouard and Nesbitt JJ. dissenting, that to load at Fort William meant to load at the elevator there; that the obligation of the ship-owner was to have the vessel placed under the elevator in time to be loaded before the expiration of the time limit; and where, finding several vessels ahead of him, the captain saw that he could not be loaded by the time fixed and left to save insurance, the obligation was not fulfilled and the owner could not recover damages.

Per Killam J. The contract would have been fulfilled if the vessel had arrived at Fort William in time to load under the conditions which might be supposed to exist on arrival.

Judgment appealed from (6 Ont. L. R. 432) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial in favour of the plaintiffs.

The question for decision on this appeal is sufficiently shown by the above head-note and the facts are set out in the judgment of Mr. Justice Davies.

Borden K.C. and *Hodgins K.C.* for the appellants. The undertaking to load within a fixed time is an absolute engagement, for non-performance of which the charterer is liable no matter what are the impediments he encounters. Scrutton on Charter Parties, 4 ed. p. 242, art. 131. *Postlethwaite* v. *Freeland* (2); *Hudson* v. *Ede* (3); *The Jeaderen* (4).

*PRESENT:—Sir Elzéar Taschereau, C. J. and Girouard, Davies, Nesbitt and Killam JJ.

(1) 6 Ont. L. R. 432.
(2) 5 App. Cas. 599.
(3) L. R. 2 Q. B. 566.
(4) [1892] P. D. 351.

The ship owner complied with the terms of the contract by sending the ship to Fort William. He was not bound to put her under the elevator. *Nelson* v. *Dahl* (1); *Tharsis Sulphur & Copper Co.* v. *Morel Brothers & Co.* (2).

The word "load" in the charter does not mean that the ship is to complete loading within the time but only that the owner must do all in his power to have her in a position to receive cargo. *Harris* v. *Best, Ryley & Co.* (3); *Grant & Co.* v. *Coverdale, Todd & Co.* (4); *Stanton* v *Austin* (5).

Aylesworth K.C. and *Moss* for the respondents. The custom of the port and the conditions so late in the year must be incorporated in the contract. *Hudson* v. *Ede* (6)

Considering the conditions the ship did not arrive ready to load at a reasonable time before the date fixed. *Ford* v. *Cotesworth* (7); *Hick* v. *Raymond & Reid* (8); Scrutton on Charter parties, 4 ed. p. 244.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed for the reasons stated by Mr. Justice Davies.

GIROUARD J. (dissenting).—I would allow the appeal. I concur in the opinion of Mr. Justice Nesbitt.

DAVIES J.—This is an action brought by the appellants, owners of the steamer Midland Queen, against the respondents, the charterers of such steamer, to recover $4,590 for loss of freight through alleged failure to load the steamer within the time specified

(1) 12 Ch. D. 568.
(2) [1891] 2 Q. B. 647.
(3) 68 L. T. 76.
(4) 9 App. Cas. 470.
(5) L. R. 7 C. P. 651.
(6) L. R. 2 Q. B. 566.
(7) L. R. 5 Q. B. 544.
(8) [1893] A. C. 22.

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in the charter with a cargo of grain from the elevators in Fort William. The respondents counterclaimed for $10,000 on the ground that it was the appellants who were in default as they had not complied with what the respondents claimed was their contractual duty under the charterparty of placing their steamer in a position to be loaded at the elevator within the time limit of the charter.

The learned trial judge found that the steamer had complied with her owners' contractual obligation when the vessel was at the pier in Fort William ready to load although she was unable to reach the elevators where she alone could take in her cargo. He held that the stipulation as to time was in terms unconditional, and that the steamer having reached Fort William and notified the respondents of its readiness to receive the cargo it had done all it was bound to do and the unconditional contract of the charterer at once attached. He accordingly found for the ship-owners for the full amount of his lost freight and dismissed the charterer's counterclaim.

On appeal to the Court of Appeal for Ontario the judgment was reversed mainly on the ground stated in Chief Justice Moss's reasons for judgment that the ship-owners had not complied with their contractual obligation to bring their steamer to the elevators at Fort William which must be held to be the understood place between the parties where, according to custom and usage at Fort William, the vessel was to load. That court accordingly (Mr. Justice Maclennan dissenting) dismissed the plaintiffs' claim and allowed the charterers $50 as and for nominal damages under their counterclaim. From this latter judgment the ship-owners appeal to this court.

The point on which our decision must turn is a narrow one and not absolutely free from doubt, but

after a careful examination of the numerous cases cited and much consideration of the able arguments presented at the bar, I am of the opinion that the judgment of the Court of Appeal is correct and that this appeal must be dismissed.

The contract of charter is contained in three short telegrams which passed between the agents of the parties, as to which there is, so far as the main question is concerned, no important dispute. In order that these telegrams may be understood I may premise that Playfair was the manager of the appellant company; that Read, one of the Grand Trunk Railway officials, was acting in the matter of obtaining a charter for the steamer as the agent of Playfair's company; and that Crowe, who was not connected with either the appellant or respondent company, was the secretary-treasurer of another elevator company dealing in wheat and respondents contended acted in this matter as agent for respondents. Mr. Crowe's position, however, was only important in a subsidiary view of the case which I do not find it necessary to discuss. The telegrams read as follows:

TELEGRAM—READ TO CROWE. (PART 12.)

MONTREAL, November 23.

Playfair confirms charter *Queen*, Fort William to Goderich, loading about December 2nd, weather, ice, permitting four and a half cents bush., confirm.

A. F. READ.

TELEGRAM—CROWE TO READ. (PART 13.)

Time 12.36 p.m. From Winnipeg, 23, 11, 1901.

We confirm *Midland Queen*, four and half, Goderich, load Fort William, on or before noon, fifth December.

G. R. CROWE.

LETTER—READ TO CROWE. (PART 14.)

MONTREAL, November 23.

Playfair wires confirming charter to you of steamer *Queen*, to load at Fort William before noon December 5th, to Goderich, at four and a half cents per bushel. Please say who she is to be loaded account of and to whom captain will apply for grain.

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The elevators at Fort William were owned and controlled by the C. P. R. Co., over which neither of the parties to this contract had any control.

The steamer Midland Queen left Midland for Fort William on the afternoon of Saturday, November 30th, and arrived there on the afternoon of Tuesday, December 3rd, being the last boat to arrive seeking a cargo that season. That left ample time to load provided the steamer had the right of way but unfortunately some eight vessels were ahead of her. She was tied up to the pier and although there is some dispute about the facts it must be held for the purposes of this appeal that her arrival was reported by her captain to the superintendent of the elevators there and to Mr. Reese, the respondents' agent on the same afternoon she arrived. The captain immediately telegraphed to his owners and informed them that there were eight boats ahead of him and that it was impossible to load before Saturday or Sunday. The steamer remained in the procession of vessels leading to the elevators until 10 o'clock on the 5th December when, the vessels ahead of her being loaded, she was ordered under the shoots or spouts of the elevators to receive her cargo. The respondents had her cargo ready in the elevators to load on the 4th December, but how long before that date is not in evidence. As it was manifest that the steamer could not then be loaded before noon of the 5th, the time limit of the contract, the captain, acting under orders from his owners whose insurance expired at noon of same day (unless the vessel had then sailed on her voyage), refused to go under the elevators and sailed for home without her cargo, leaving port in time to save her insurance.

The Court of Appeal for Ontario held, I think, rightly, that, by the true construction of the contract of charter, the vessel was to be fully loaded by the time specified,

noon on the 5th December, and not merely started loading, and that if she had in other respects complied with her contract she was not bound to wait for her load after that time. It was strongly pressed by Mr. Aylesworth that if the ship abandoned her contract on the time limit being reached and the charterer showed himself at that time ready and able to go on with the loading of a cargo which the vessel refused to receive, the ship owner could not recover his full freight but only the real and substantial damage he could show he actually sustained by any delay beyond the hour, and that at any rate he was bound to go on receiving cargo until the last minute of time. These questions, however, which go altogether to the quantum of damages recoverable, on the view I take of the case, are unnecessary to be considered. In the final analysis the questions upon which the case must turn are simply whether, to initiate liability of the charterer to load under the terms of the charter-party, the ship had performed her part of the contract when she had reached and reported herself at the port of Fort William in a reasonable time to permit of her being loaded before noon of the the 5th, and whether the named place to load in the contract must be read and considered as *the place of loading which is by the usage and custom of the port intended by the name and at which alone loading could take place.* Mr. Borden freely conceded that Fort William, mentioned in the contract as the place of loading, did not mean the harbour of that name as defined and delimited by statute or as understood geographically. He agreed that the name of the place or port mentioned in the charter party must be taken in its commercial sense which may well differ from its strict legal or geographical meaning. As Mr. Carver states it on page 644 of his book on Carriage by Sea (ed 1900):—

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The word "port" in the charter party must be construed by reference to the meaning commonly given to it by merchants and shipowners. The extent of the particular port, as understood by them, is not necessarily, or ordinarily, determined by its legal definition for fiscal or like purposes or even by geographical considerations. Its extent in a commercial sense is rather shown by such considerations as the safety afforded for shipping, the convenience for loading and unloading, the usages of the place with regard to anchoring, loading and discharging, and the area over which those matters are regulated by the authorities having jurisdiction in the port.

I conceive this must necessarily be the proper rule of construction and once it is adopted, once the name of the port or harbour of loading is agreed to be a conventional one signifying not a legal place or a geographical one but one as understood by merchants and shippers determinable by considerations respecting places of loading and unloading, it leads, in my opinion, logically to the conclusion stated by Lord Esher, then Brett L.J., in the rules he formulated for the construction of charter-parties in the well known case of *Nelson* v. *Dahl* (1). Those rules are fairly summarised by the editors of the 1901 edition of Abbott on Shipping, at page 392. The first one is stated as follows:

> Lay days begin to run where a port is named in the charter-party when the ship is *at the usual place of discharge* in that port or if there is more than one usual place of discharge at that place of discharge which the charter designates.

The same rule is of course applicable to loading. But the specific language used by Lord Esher is clearer and certainly more definite. He says, page 582, speaking of a charter-party which names a port generally at which to load:

> He (the ship-owner) cannot place his ship at the disposition of the charterer so as to initiate the liability of the latter as to the loading until the ship is at the named place *or the place which is by custom considered to be intended by the name; as if a larger port be named the usual place in it at which loading ships lie.*

(1) 12 Ch. D. 568 at p. 582.

And again at page 584, in speaking of unloading the ship and the respective rights of the ship-owner and charterer, he says:

> But in the absence of his (the ship-owner's) right to place the ship only as "near to the named place as she can safely get" (and of course this refers to the ship-owner's *contractual* right as in the charter-party His Lordship was then considering) *the ship-owner's right to have the charterer's liability to unload, initiate, does not commence until the ship is in the named place.*

In other words, as I understand it, the named place if a larger port be expressed having within it a usual or customary place of loading the latter will be held to be the meaning of the contract and he must go there with his ship before he can initiate the liability of the charterer to load and he cannot excuse himself by the presence of physical difficulties such as other ships having priority of passage preventing him reaching the place, or by prohibitory orders of the port or dock authorities. The case of *Dahl* v. *Nelson, Donkin & Co.* went by way of appeal to the House of Lords (1) and the decision of the Court of Appeal was affirmed. I cite this decision in the House of Lords for the proposition that, if a ship agrees to go to a certain dock or other similar place, she does not fulfil her engagement by merely going to the gates of the docks, and the fact that she is refused admission to the docks because they are full is no excuse for the ship nor is any duty cast upon the charterer of procuring her admission.

In giving judgment, at page 42, Lord Blackburn says:

> The plaintiffs contended in the court below that by such a charter party as this the merchant undertakes to procure the ship admission into the docks. Neither the Master of the Rolls nor the judges in the Court of Appeal took this view of the charter party, and it was not much urged at your Lordship's Bar. I think it is clear that it is untenable. The legal effect of the contract, in my opinion, as far as regards the shipowner is, that he binds himself that his ship shall (unless prevented by some of the excepted perils) proceed to the dis-

(1) 6 App. Cas. 38.

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charging place agreed on in the charter party. That is, in this case, the *Surrey Commercial Docks* (which must, I think, mean inside the docks), with an alternative (as stated in the charter party) "or so near thereto as she may safely get and lie always afloat."

And on page 58 Lord Watson says:

The appellants maintained that there can be no impossibility within the meaning of the contract unless the vessel is stopped by an impediment which is both physical and permanent; but I greatly doubt whether, in any fair construction of the charter party, it is necessary that the obstruction should be of a purely physical character; and I also doubt whether there be any foundation in fact for the appellant's contention. The exclusion of the *Euxine* from the Surrey Docks in August, 1877, was owing to a rule made by the statutory authorities entrusted with the admiuistration and control of the dock. It is not suggested that the rule was in excess of their powers, or that it was not capable of being legally enforced. And I am opinion that an order emanating from the proper authority, which, if disregarded, would lead either to the dock gates being shut against the vessel or to her being turned summarily out of the dock if she did get into it, does in reality constitute a physical obstacle.

The decision in *Davies* v. *McVeagh* (1), as explained in *Tharsis Sulphur & Copper Co.* v. *Morel Brothers & Co.* (2), is not in conflict with this decision, and, if in conflict, must be considered as overruled.

If my construction of this contract is correct, if the ship-owner's obligation was to bring his vessel to the customary or usual place of loading at Fort William in such a reasonable time as would permit of her being loaded before the expiration of the time limit and if he failed to do so, then the reciprocal obligation on the part of the charterer never arose or attached. The evidence in this case establishes, and it was not contended otherwise, that the elevators by usage and custom are the only places in Fort William where grain can be laden aboard a vessel. There is no other place, way or method in that port at which or by which ships can be loaded. They are the only places,

(1) 4 Ex D. 265. (2) [1891] 2 Q. B. 647.

therefore, at which the charterer undertook to do his part, and his contractual obligation does not arise unless and until the ship is ready for him there. The fact that she is prevented from getting there by the prior presence of other ships or by the action of the harbour or dock authorities does not matter. The reason which might prevent him from fulfilling his contractual duty of having his ship ready at a particular place to receive her cargo cannot impose upon the charterer an obligation which only could arise under the contract when the ship owner had the ship ready for him at that place. Here at Fort William are no series of docks or piers; here are no different methods of loading steamers; here is only one place at which and one method by which vessels can be loaded and these are at the elevators and by means of the shoots or spouts. "Loading at Fort William" can therefore have one and only one meaning and that is loading at the elevators at Fort William. These facts were well known to all the parties to the contract and there cannot, in my judgment, be any doubt of their intentions. Then, if this conclusion is correct, *cadit quaestio;* the Midland Queen, by fastening herself to the quay or pier in the long procession of boats leading to the elevators, did not fulfil her part of the charter party any more than did the vessel in the case of *Dahl* v. *Nelson, Donkin & Co.* (1) which contracted to go to the "Surrey Commercial Docks", fulfil hers by going to the entrance or mouth of the docks.

A good deal was said about the fact that the time specified in the contract being a definite one many of the cases cited having reference to lay days, etc., were inapplicable or distinguishable, and I think that is so. But the presence or absence of a time limit cannot affect the interpretation to be given to the contract so

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far as the place where the ship owner is bound to have his vessel ready for cargo is concerned. Once that is conceded to be the elevators and it is shown he had not his vessel there all doubt ceases and the question of time limit becomes irrelevant. The definite time mentioned throws no greater risk or duty upon the charterer in this view than upon the ship. The loading was a mutually reciprocal act to be performed by both parties. One provided the grain in the elevator ready to pour down the shoots when the hold of the vessel was placed below them, but the ship owner had to put his vessel there to receive the grain in such reasonable time as would enable her to be loaded if the grain was there already for her, and so we come back to the question with which I started, whether under the contract as construed with respect to the proved custom and usage of loading vessels at Fort William the ship was obliged to be ready to receive her cargo at the elevators a reasonable time before the expiration of the time limit so as to enable the loading to be finished in time. If so there has not been any default on the charterers' part. He had as proved the cargo all ready to load as soon as the ship was ready to receive. He is not responsible for the delay in the arrival of the steamer at the port, nor for the obstacles which after her arrival prevented her reaching the spot where alone she could load and where custom and usage determined the time and manner of her loading. Other important questions arising out of the alleged lateness of the steamer's arrival at the port and as to the question of damages which, if entitled at all to receive, she should recover, and questions as to the effect of the elevator regulations upon his contract, become unnecessary to decide and I do not touch upon them.

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I agree with the decision of the Court of Appeal that the defendants are entitled to nominal damages on their counterclaim, and I therefore think that this appeal should be dismissed with costs.

NESBITT J. (dissenting).—This case appears to me, under the authorities, to be within a very narrow compass. I agree that the parties must be taken to have contracted with reference to the port at which the loading was to be done and its customs. I think it clear that, apart from the fixed time for loading, a reasonable time would be allowed, as in the case relied on by my brother Killam, (1) but there the point is expressly made that

there was no engagement by the freighters to load the vessel within any particular time.

Had there been such an engagement there must have been a breach of it and the freighter would have had himself to blame for contracting to perform what was impossible The fixed time would have been inconsistent with the circumstances. However, here the parties did not and could not know but that when the boat arrived she could go to the spot for loading, and the shipowner took his chances of perils of the sea, etc., and contracted she would be at Fort William in time to load, and the freighter took his chances of the interference of the elevator authorities through their rules and agreed to the fixed time for loading, an agreement which cannot possibly be given effect to unless you read into the contract words limiting the freighter's liability such as "provided the C.P.R. can give you your turn in time" or "provided the wheat you are taking is not in any elevator already engaged in loading other boats" contingencies the freighter must provide against. See Scrutton's Charter Parties,

(1) *Harris* v. *Dreesman*, 23 L. J. Ex. 210.

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(4 ed.), p. 242; Anson on Contracts, (7 ed.), p. 323; Abbott on Shipping, (14 ed.), 372; *Good & Co.* v. *Isaacs* (1), per Kay, L. J., at page 562, where he distinguishes that case on the ground that it is not one *where the charter stipulated for a fixed time.* It seems to me clear that when the vessel arrived at Fort William she completed her part of the contract as it was impossible for her to know the spot of loading until she arrived there and received orders from the shipper after he received information from the C.P.R. This seems to me to entirely dispose of the suggestion that the vessel must go under the elevator spout in order to fulfil her contract and to be ready to take her share in the loading. There must be some definite point where, as a matter of law, the boat, at the time she leaves Midland, must be bound to go in order to fulfil her contract. That point cannot be a shifting one. It cannot be that it would fulfil her contract to report at elevator A., when her load, as a fact, was at elevator B. or C., a third of a mile or a mile away There must be some definite spot so that the vessel can legally tender herself at a definite point and say, "I have fulfilled my contract and am here ready to take my cargo," and where a court could say that she had arrived. Suppose there were fifteen or twenty elevators at Fort William, as there probably will be in the next few years, at any one of which the C.P.R. would be entitled to say to the Dominion Elevator Company, we propose having you take your load at number one or number fifteen, as the case might be, can it be suggested that a shipowner must go to each one of the twenty and tender before he can be said to have completed his right to claim loading by the shipper? This seems to be so unless the contract is held to be fulfilled by his arrival at the port of Fort William, and information to the

(1) [1892] 2 Q. B. 555.

defendant company that he is there ready to receive his orders to go whatever spot they may designate.

The Chief Justice in the Court of Appeal evidently was of opinion that the contract had to be changed by reading into it the term "at the usual place". That is not the contract and the court has no right to make a new one for the parties, and, even if so read, which "usual place" is meant?

Then, as to whether the plaintiff was bound to arrive in such time that the ship would have precedence over other ships, that she would be certain to receive her cargo before noon, I think such a construction would entirely destroy the effect of the time limit. The cases seem to be quite plain that that would be the rule where there was not a definite time for loading the cargo, but the authorities all seem to establish that, as I have pointed out above, where there is such a definite time fixed, that is an absolute contract to have the loading finished within such time, and the shipper takes the risk of any causes that he might have provided against.

I think that if the ship-owner had failed to report at Fort William at an hour which would have enabled the loading to take place, that he, in the same way, would have been responsible under the contract, although the delay might have taken place from stress of weather or anything happening to the ship, if the shipowner did not see fit to provide for such exceptions. He was bound to perform his unconditional contract to get to Fort William in time to report a sufficient length of time beforehand to enable the vessel to be loaded, and so, in the same way, the shipper, under such a specified time limit, was bound to have his grain ready to load notwithstanding it was rendered impossible by circumstances over which he had no control. I agree with the judgment of Mr.

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Justice Maclennan on both these points. I do not think that the Dominion Elevator Act is applicable. I think the appeal should be allowed and the judgment of the trial judge restored with the variation that there is to be a reference to ascertain the difference between the expense of the return trip from Fort William to the home port, and what would have been the expense had the freight been earned by the vessel going to Goderich and thence to the home port.

KILLAM J.—This action was brought by a ship-owning company upon a contract, claimed to have been made by telegraphic communication between a Mr. Crowe, of Winnipeg, Manitoba, acting on behalf of the defendant company, and a Mr. Read, of Montreal, representing the plaintiff company, for the supplying of a cargo of grain to be carried from Fort William to Goderich by the steamer Midland Queen.

The transaction was initiated by an offer of the vessel by Read to Crowe for her last trip in the season of the year 1901. As satisfactory arrangements were not made between them Crowe turned the offer over to the defendant company and became the medium through whom the alleged contract was made. There was some contention on the part of the defence that any contract which was made was between the defendant company, through its own officials, and Crowe, as representing the plaintiff company. But it appears to me that the view taken by the courts in Ontario was correct, that in the communications Crowe was authorised to act and did act as the agent of the defendant company and formed a binding contract on its behalf with the plaintiff company.

The respective rights and liabilities of charterer and ship-owner, under a contract of this kind, were well

expressed by Brett, L.J., in *Nelson* v. *Dahl* (1). At pages 581, *et seq.*, he is reported as saying:

The first right of the ship-owner is the right of placing his ship at the disposition of the charterer so as to initiate the liability of the latter, whatever it may be, to take his part as to loading. In every case it seems to me that it is a condition precedent to such right of the ship-owner to place his ship at the disposition of the charterer for such purpose that the ship should be at the place named in the charterparty as the place whence the carrying voyage is to begin, and that the ship should be ready to load, so far as the ship's part of the operation of loading is concerned. The place so named may give a description of a larger space, in several parts of which a ship may load, as a port or dock; or it may be the description of a limited space in which the ship must be in order to load, as a particular quay, or a particular quay berth, or a particular part of a port or dock. * * * The further right of the ship-owner as to the loading is, of course, his right to insist on the liability of the charterer, whatever that may be, which attaches when and after the ship is duly placed at his disposition. The liability of the ship-owner as to the commencement of the loading depends on the particular form by which he has bound himself to place his ship at the disposition of the charterer for that purpose. He must do so "with all convenient speed," or "with all possible despatch," or "immediately, unless prevented by enumerated accidents," or "within a reasonable time," according to his agreement in each case. * * * * * * *

The primary right of the charterer as to the loading under a charterparty in ordinary terms seems to me to be that he cannot be under any liability as to loading until the ship is at the place named in the charterparty as the place whence the carrying voyage is to begin, and the ship is ready to load, and he, the charterer, has notice of both these facts; when these conditions are fulfilled the liability of the charterer begins. The extent of that liability depends on the form as to it of the charterparty. If there be no undertaking that he will load the ship at all events within a specified time, he will be bound to use reasonable diligence to do his part towards the loading according to the terms or meaning of the charterparty; that is to say, "with all possible despatch" or "with usual despatch" or "with the customary despatch of the port," or "within a reasonable time." But whenever in the charterparty it is agreed that a specified number of days shall be allowed for loading, and that it shall be lawful for the freighter to detain the vessel for that purpose a further specified time on payment of a daily sum, this constitutes a stipula-

(1) 12 Ch. D. 568.

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tion on the part of the freighter that he will not detain the ship for the purpose of loading beyond those two specified periods. This is the principle laid down in *Ford* v. *Cotesworth* (1). If the ship in such case is detained beyond the specified lay days, the charterer must pay demurrage or damages in the nature of demurrage, though the delay in loading has occurred from causes wholly beyond the charterer's control.

These statements of the law are fully supported by the cases to which the learned Lord Justice referred. See *Randall* v. *Lynch* (2); *Brereton* v. *Chapman* (3); *Kell* v. *Anderson* (4); *Brown* v. *Johnson* (5); *Tapscott* v. *Balfour* (6).

The principle on which the decisions were based, where the time for loading or discharging was expressly limited, was that the expression of the term implied the duty to give up the ship on its expiration. See *Randall* v. *Lynch* (2). But, as pointed out by Lord Blackburn in the House of Lords, upon appeal from the judgment in *Nelson* v. *Dahl, sub nom. Dahl* v. *Nelson, Donkin & others* (7), cases of that kind, deciding when lay days commence, have no direct bearing on a case like the present.

As stated in Abbott on Shipping (14 ed.) at p. 373.

> If a charterparty makes no express provision for the time to be allowed the merchant for loading or discharging, the law will imply that the parties intended that a reasonable time should be allowed for these operations. Questions have arisen as to whether reasonable time is to be measured by reference to the circumstances which ordinarily exist or to the actual circumstances at the time of the performance of the obligation. It is now settled that the latter is the true measure, provided that the delay complained of is attributable to causes beyond the control of the party on whom the obligation rests.

See, also, Scrutton on Charter Parties (5th ed.) p. 520; *Burmester* v. *Hodgson* (8); *Rodgers* v. *Forresters* (9);

(1) L. R. 4 Q. B. 127; 5 Q. B. 544.
(2) 2 Camp. 352; 12 East 179.
(3) 7 Bing. 559.
(4) 10 M. & W. 498.
(5) 10 M. & W. 331.
(6) L. R. 8 C. P. 46.
(7) 6 App. Cas. 38, at p. 43.
(8) 2 Camp. 488.
(9) 2 Camp. 483.

Ford v. *Cotesworth* (1); *Postlethwaite* v. *Freeland* (2); *Hulthen* v. *Stewart & Co.* (3).

In *Randall* v. *Lynch* (4), the charter party provided for discharge of the ship at the London opcks and that forty days should be allowed for unloading, loading and again unloading, to commence at the port of beginning of the voyage and to continue in London from the day ot reporting at the Customs House, with a further allowance of ten days demurrage at a stipulated price per day. On account of the crowded state of the docks the discharge was not completed until after the expiration of both the lay days and the demurrage days. It was held by Lord Ellenborough that the charterer was liable for the detention, and this view was upheld by the court *en banc.*

The case of *Rogers* v. *Forresters* (5) came on for trial subsequently before the same learned judge, when it was found that the charterparty provided merely that the freighter should be allowed the usual and customary time to unload the ship at the port of discharge. The ship entered the docks on the 25th of August and was reported the following day. On the 31st August the cargo was bonded by the defendant and he was ready to receive it if it could then be unloaded, but on account of the crowded state of the docks at the time much delay ensued. If the duty had been immediately paid, instead of the cargo being bonded, the discharge might have been made much sooner. Lord Ellenborough considered that, as it was shown that the usual and customary time to unload such a cargo was when the ship obtained a berth, by rotation, and the cargo could be discharged into the bonded warehouse, and as, though the cargo might have been landed if the duties had been immediately paid, the

(1) L. R. 4 Q. B. 127; 5 Q. B. 544.
(2) 5 App. Cas. 599.
(3) [1902] 2 K. B. 199; [1903] A. C. 389.
(4) 4 Camp. 352.
(5) 2 Camp. 4-3.

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bonding system was usual and customary, the charterer was not in fault, but that he had unloaded the ship in the usual and customary time for that purpose at the port of discharge.

This view was supported in *Ford* v. *Cotesworth* (1), and *Postlethwaite* v. *Freeeland* (2).

In the present case we have not the advantage of a formal charterparty in terms of recognized meaning. There are merely fragmentary telegrams from which to infer the various terms of the contract. In dealing with such a case we should act, I think, upon the principles stated by Lord Watson in *Dahl* v. *Nelson, Donkin and others* (3), at p. 59:

> I have always understood that, when the parties to a mercantile contract, such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

Here, the ship was to load at Fort William on or before noon on the 5th of December. I agree with the construction placed upon the word "load" in the courts below, that the loading was to be completed, and not merely commenced, by the hour named.

On behalf of the plaintiff company it is argued that, on account of the limit of time stipulated for, the only

(1) L. R. 4 Q. B. 127; 5 Q. B. 544.
(2) 5 App. Cas. 599.
(3) 6 App. Cas. 38.

liability of the ship owner was to have the ship at the port of Fort William and notice thereof given to the representatives of the defendant company at that place. It is quite incorrect to speak of this as a case of an engagement to load "within" a fixed time. The end, but not the beginning, of the period is fixed. It is evident that something more must be implied in such a contract. It must be admitted that the ship should have arrived in sufficient time to enable the shipper to load her by the stipulated hour. And the real question is whether the shipper was to be ready, at all events and under any circumstances which might be found to exist at the time, to load the ship immediately upon notice of her arrival, and within the time which would be necessarily occupied by the act of loading only; or whether the ship should have arrived in time to reach the particular loading place where she could receive her cargo and be there loaded, notwithstanding delays due to the crowded state of the dock.

Where a contract requires a ship to go to a particular port for loading, the ship must proceed to the usual place of loading in that port, though, in general, not necessarily to the particular berth or spot where the loading is to be actually carried on. *Brereton* v. *Chapman* (1); *Kell* v. *Anderson* (2); *Nelson* v. *Dahl* (3).

The view taken by the Court of Appeal was that, having reference to the state of affairs and the ordinary course of business at Fort William, the ship would not be at the place of loading to which it was the duty of the ship owner to take her until she arrived at the very elevator and under the very spout or spouts from which the grain was to be placed in her. It does not appear to me that, having regard to the authorities upon contracts of this kind, this duty was thrown

(1) 7 Bing. 559. (2) 10 M. & W. 498.
(3) 12 Ch. D. 568 at p. 582.

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absolutely upon the ship-owner. The ship arrrived at the port of Fort William on the afternoon of the 3rd December. She proceeded to the only dock or wharf in the port and was there tied up. It appears to me that she had then reached the place of loading, within the meaning of the authorities, as distinguishable from the particular berth or spot at which she was to load. But, on the other hand, I do not think that the ship owner's duty was fulfilled by placing the ship in that position in sufficient time only to enable the shipper to have her taken at once, irrespective of the circumstances found to exist, to the particular spot for loading and have her filled on or before noon of the 5th December. If there had been but one elevator or one berth or spot in the port at which the ship could be loaded, probably the view taken by the Court of Appeal would be the correct one; but there were three elevators, to any one of which the ship might be assigned for loading.

The only practicable method of loading the ship, and the only one in the contemplation of the parties, was by discharging the grain through spouts from the elevators. The number and positions of the elevators were in the knowledge of both parties when the contract was made. It was usual, at the time of year, to find the dock crowded with vessels, and both shippers and shipowners striving to get out as many cargoes as possible before the close of the season. This, also, was within the knowledge of the parties. The elevators at the port were owned and controlled by the Canadian Pacific Railway Company. Under the regulations of that company, each ship seeking to be loaded at one of the elevators was obliged to take its turn in order of arrival at the dock. No exception to this rule was admitted, except in the case of vessels known as "liners", to which class the plaintiff's vessel did not

belong. This rule, also, was well known to both the parties. It appears to me that, under such circumstances, it is unreasonable to imply that the shippers agreed, or intended to agree, or would have agreed, to have the ship loaded immediately upon her arrival, irrespective of the number of ships awaiting cargoes.

It does not appears that, when the telegrams constituting the contract were exchanged, the officers of the defendant company were aware of the exact position of the Midland Queen, or at what it was possible for her to be at Fort William in readiness to receive the cargo contracted for. In one of the preliminary telegrams from Mr. Read to Mr. Crowe, Read offered the ship to be "loading about December 2nd". In a letter of the same date, written by the manager of the plaintiff company from Midland, Ontario, to Mr. Crowe, it was stated that the ship had left Midland on the previous day and was going right back there, and that if all should go well the ship should be at Fort William to load about the 1st of the month. This letter is not clearly shewn to have been communicated to the defendant company before the alleged breach of contract on the 5th December, and certainly its contents were not within defendant company's knowledge when the telegrams passed. However, even that letter did not say where the ship was going at the time, and it appears from it that, in the view of the plaintiff company's manager, it was expected that she could reach Fort William by the 1st December. Thus, there was nothing in the circumstances to lead the defendant company to believe, when the telegrams passed, that the situation of the ship was such that she could not reach Fort William sufficiently soon to allow of a reasonable time for any delay due to the crowded state of the dock. The offer of her to be "loading

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about December 2nd" was calculated to suggest the contrary.

The decision which appears to come nearest to the present case was that in *Harris* v. *Dreesman*. (1) In that case, it was shewn that the master of a vessel had agreed to proceed to a particular colliery and take on board a cargo of coal. Before the charterparty was signed both parties knew that the colliery was not at work, an accident having happened to a steam-engine, and both were told that the engine would be repaired in a short time, and that the vessel would be loaded in her turn within a few days after the colliery got to work again, which was expected to be in the middle of the next week. Work was not resumed at the colliery as soon as the colliery agents had estimated would be the case. The result was delay in the loading of the ship. The shipper had no control over the colliery. It was held that the shipper was entitled to a reasonable allowance of time for the steam-engine to be repaired and the colliery got to work, and that, if the vessel was loaded within a reasonable time thereafter, the shippers were not liable, but that they would be liable for any greater delay than could be reasonably expected for the repair of the engine and the starting of work at the colliery.

When the Midland Queen arrived at Fort William eight vessels were in advance of her awaiting cargoes. These were loaded with expedition, each vessel moving up towards the elevators as one made room for her. The result was that the vessel immediately in advance of the Midland Queen completed her loading at the elevator nearest the mouth of the port on the morning of the 5th December, too late to admit of any considerable cargo being placed upon the Midland Queen before noon of that day. The Midland Queen was then at a

(1) 23 L. J. Ex. 210.

distance of about 100 feet from the nearest elevator, in which, however, there was only a small quantity of grain left. At the next elevator another ship was receiving her cargo, and room would shortly have been made there for the Midland Queen after taking in the grain that was left in the first elevator. This state of affairs was not unusual at that time of year. It was a state of affairs that should reasonably have been contemplated by the parties. There does not seem to have been any delay on the part of any one, plaintiff, defendant or railway company, from the time of the arrival of the Midland Queen at Fort William until room was made for her at the first elevator. The defendant company sought to induce the officials of the railway company to load the Midland Queen in advance of her turn, but was unable to do so.

Upon some evidence given by Mr. Crowe as to the understood practice in the grain trade, it was contended that the shipper had the option, under the contract, to load at Fort William or to send the ship to a certain elevator at Port Arthur, which was another port near by, to be loaded; and it was argued that it was the duty of the shipper to do this if a load could not be furnished at Fort William in sufficient time to insure the fulfilment of the contract. No reliance seems to have been placed upon this evidence in the courts below, as sufficiently indicating a practice binding upon the parties. The action of the master of the ship and the defendant company and their Fort William agent seems to indicate that none of them contemplated this course as being open, except by fresh agreement. It appears to me that this element should not be taken into consideration in this case.

In my opinion, it was a condition precedent to the liability of the defendant company to procure the Midland Queen to be loaded on or before noon of the

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5th December, that she should arrive at Fort William in reasonable time to allow this to be done, having reference to the state of affairs which the parties should reasonably have expected to exist upon her arrival. The circumstances that did exist in the present case were only such as were usual at that season, and such as the parties must naturally have comtemplated as likely to exist. In *Postlethwaite* v. *Freeland* (1), Lord Selborne L.C. said :

> Difficult questions may someties 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.

As the ship was in default in not arriving in reasonable time to obtain her load by the stipulated hour of the 5th December, and again in departing unloaded without sufficient excuse, it appears to me that the Court of Appeal was justified in reversing the judgment for the plaintiff company, and in holding it liable for breach of contract. Upon the grounds stated in the Court of Appeal, I agree that substantial damages should not have been allowed. I would dismiss the appeals with costs.

Appeal dismissed with costs.

Solicitors for the appellants : *McMurrich, Hodgins & McMurrich.*

Solicitors for the respondents : *Barwick, Aylesworth, Wright & Moss.*

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(1) 5 App. Cas. 599.