1885
*Nov. 3.

JAMES LORD, *et al*, (Defendants)..... .....APPELLANTS.

AND

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*March 6.

THOMAS HENRY DAVIDSON (Plaintiff) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE), MONTREAL.

Charter party—Deficient cargo—Dead freight—Demurrage.

By charter party the appellants agreed to load the respondent's ship at Montreal with a cargo of wheat, maize, peas or rye, "as fast as can be received in fine weather," and ten days demurrage were agreed on over and above lying days at forty pounds per day. Penalty for non-performance of the agreement, was estimated amount of freight. Should ice set in during loading so as to endanger the ship, master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward for ship's benefit.

The ship was ready to receive cargo on the 15th November, 1880, at 11 a.m., and the appellants began loading at 2 p.m. on the 16th November. After loading a certain quantity of rye in the forward hold, as it would not be safe to load the ship down by the head any further, the captain refused to take any more in the

*PRESENT.—Sir W. J. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

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forward hold. No other cargo was ready, and as the appellants would not put the rye anywhere except in the forward hold, the loading stopped. At 8 a.m. on the 19th the loading recommenced and continued night and day until 6 a.m. Sunday, the 21st, at which time the vessel sailed, in consequence of ice beginning to set in. When she sailed she was 214½ tons short of a full cargo. If the ice in the canal had not detained the barges having grain to be loaded, the vessel could have been loaded on the night of the 19th. The respondent sued appellants because ship had not received full cargo, and claimed 2½ days, 15th, 16th and 17th of November, and freight on 214½ tons of cargo not shipped. The appellants contended delay was not due to them but to the ship in not supplying baggers and sewers to bag the grain. That the time lost on the first week was made up by night work, and that mere delay in loading could not sustain claim for dead freight.

The Superior Court gave judgment for the respondent for the dead freight but refused to allow demurrage. This judgment was affirmed by the Court of Queen's Bench (appeal side).

On appeal to the Supreme Court of Canada.

Held, affirming the judgment of the court below, Henry J. dissenting, that as there was evidence that the vessel could have been loaded with a full and complete cargo without night work before she left, had the freighters supplied the cargo as agreed by the charter party, the appellants were liable for damages and that the proper measure of the respondent's claim was the amount of agreed freight which he would have earned upon the deficient cargo.

That the demurrage days mentioned in the charter referred to, and were over and above, the laying days and had no reference to the loading of the ship.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side).

This action was instituted by the respondent, as owner of the S. S. "Whickham," for two and a half days' demurrage (£100) and for dead freight (£313).

The judgment of the court of the first instance allowed the dead freight (£313), rejecting the claim for demurrage.

From this judgment an appeal was taken by the appellants to the Court of Queen's Bench, (appeal side),

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and also a cross appeal for the demurrage by the respondent.

The Court of Queen's Bench confirmed the judgment of the court of first instance, and rejected the cross appeal.

The circumstances which gave rise to the action are fully stated in the head note and in the judgments hereinafter given (1).

Kerr Q.C. for appellants.

H. Abbott for respondent.

Sir W. J. RITCHIE C.J.—The respondent's (plaintiff) vessel the "Whickham" was chartered by the appellants (defendants) for a voyage from Montreal to the United Kingdom or continent. The ship was to load with a cargo of wheat, maize, peas and rye.

The only portion of the charter-party bearing on the present case, is the clause which provides that the ship should be loaded as fast as the cargo can be received in fine weather. The ship was to have an absolute lien on the cargo, dead freight and demurrage. Should ice set in during the loading so as to endanger the safety of the ship, the master to be at liberty to sail with part cargo and have leave to fill up at any open port on his way homeward for the ship's benefit

The plaintiff sued for dead freight, claiming that the ship could have been loaded with a full cargo if the defendants had not been negligent in supplying the cargo alongside. He also claimed demurrage two and a half days, the 15th, 16th and a part of the 17th of November. The dead freight claimed is on 214½ tons of cargo not shipped.

The ship left before receiving a full cargo under the provisions of the charter-party, by reason of the danger she was in from ice. The defendants contend that the delay was not due to them, but to the ship.

(1) See also M. L. R. 1 Q. B. 445.

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The claim in this case, is for dead freight and demurrage. The claim for dead freight arises in consequence of the failure to finish a full cargo. Dead freight denotes a sum agreed to be paid in respect of space not filled according to charter-party or damages provided for by the charter-party, in the event of the freighter not loading a full cargo. It is defined to be simply "an unliquidated compensation recoverable by the ship-owner from the freighter for a deficiency of cargo." And again "for the loss of freight, recoverable in the absence, or place of freight." In this case, the freighter agreed to load a full and complete cargo, and therefore he must have known, that if he failed to perform his agreement, he would be liable to the ship-owner in damages, under the name of dead freight, which damages however, in this case, cannot be considered unliquidated, because, by the express terms of the agreement, the proper measure of the ship-owners claim, is to be the amount of the agreed freight, which he would have earned upon the deficient cargo. Had there been no stipulation as to the measure of damages, then it may well be, as suggested by Lord Westbury in *McLean* v. *Fleming* (1), that unless a specific sum is fixed for dead freight all reasonable charges should be deducted, and in such a case, "in a charter-party giving no specific sum as the amount to be recovered by way of compensation for dead freight, the ship-owner becomes entitled only to a reasonable sum, which is another phrase for unliquidated damages."

In this case a specific sum was fixed for dead freight, in these terms: "Penalty for non-performance of this "agreement, estimated amount of freight." If, therefore, the ship owner was in fault, the estimated amount of freight on the cargo she might have received but for this default, would be the estimated amount of freight

(1) L. R. 2 Sc. App. 128.

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the ship would have earned but for such default.

The vessel is to be loaded as fast as the cargo can be received in fine weather; the cargo is to be brought to and taken from alongside the ship at ports of loading and discharge at merchant's risk and expense. These clauses cast on the charterer the duty of providing the cargo alongside as fast as it could be received in fine weather. The facts sufficiently show, in the absence of any evidence to the contrary, that the Port Warden's certificate was sent to the appellants office before noon of the 15th of November, and therefore the loading should have commenced on that day; but assuming that it was received after twelve o'clock of the 15th, the charterer did not commence loading until one o'clock p.m. of the 16th.

Without occupying time in going over the evidence in detail, I think it shows that had the cargo been supplied, and the vessel loaded, from the time she was ready to take in cargo, or from the sixteenth, as fast as she could have received it, she would have been loaded with a full and complete cargo before six a.m. of the twenty-first, when she sailed. There was ample evidence, in my opinion, in fact, to show that had the loading been begun when, and continued, as it should have been by the freighters supplying the cargo as required, a full cargo could have been loaded by Friday, the nineteenth, without night work, and she did not, in fact, leave until Sunday, the twenty-first. As to the loss of time from two o'clock of the seventeenth, when loading was stopped by the Captain's order, up to eight a. m, on the nineteenth, it arose entirely from the default of the shippers, the captain was justified in refusing to allow any more grain to be put in the forward hold, and the shippers should have been prepared with cargo to go on with the loading in a proper manner, and not being in a

position, or willing to do so, the responsibility for the delay must rest with them; and therefore, I think the judgment right, and the appeal should be dismissed with costs, and costs in the court below except the costs of the respondent's cross appeal which should be dismissed with costs; because, as to the question of demurrage, the two days on demurrage mentioned and awkwardly interlined in the charter-party clearly refer to and are over and above the laying days which are the running days allowed for discharging cargo, commencing from the time of the ship's being ready to deliver cargo, necessarily at the port of destination and have no reference to the loading of the ship; and therefore, there is no ground whatever, for any claim for demurrage.

As to the vessel sailing at the time she did, the provision is,—

Should ice set in during the loading so as to endanger the ship, the master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward, for ship's benefit.

This clearly shows, that if there were no laches on either side, but should ice set in, as mentioned, before a full cargo was loaded, then neither party could have any claim on the other, neither party being to blame; and the ship-owner would be entitled to freight on the cargo she was in a position to avail herself of at an open port for ship's benefit. The evidence clearly shows that the ship was entirely justified, from the state of the weather, in leaving, at the time, and under the circumstances she did. I do not think that the exercise of the option to leave without a full cargo, by any means absolved the appellants from their obligation fully to load the ship, for their failure to do so, arose from their own laches.

FOURNIER J.—Par la charte-partie, les affréteurs, Lord et autres s'étaient engagés à fournir à l'intimé, un

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chargement de grains pour le steamer Wickham, en livrant le fret aussi promptement qu'il pouvait être reçu dans le beau temps (*ship to be loaded as fast as cargo can be received in fine weather*). Le steamer fut prêt paraît-il à recevoir son chargement le 15 novembre 1880, à 11 heures a. m., mais il n'est pas prouvé que le certificat du maître du hâvre ait été livré à temps pour mettre les chargeurs en demeure de procéder ce jour-là même au chargement. Il n'est pas contesté toutefois qu'ils auraient dû commencer le lendemain matin, le 16. Cependant ils ne furent prêts à commencer qu'à deux heures de l'après-midi. Après avoir pris une certaine partie de la charge consistant en seigle (*rye*), dans les compartiments de l'avant, rien n'ayant été mis au centre ni à l'arrière, le steamer se trouvait tellement incliné que son avant plongeait de trois ou quatre pieds de plus que le reste. Le commandant crut qu'il n'était pas prudent pour la sûreté du navire de laisser mettre plus de fret dans cette partie du vaisseau, avant qu'il n'en eût été mis assez dans les autres compartiments pour remettre le vaisseau sur la ligne droite et, fit alors défense d'en mettre davantage dans le compartiment de l'avant. Les affréteurs avaient encore du seigle (*rye*) pour continuer le chargement, mais comme ils avaient destiné les autres compartiments à recevoir du blé-d'inde et qu'ils n'en avaient pas alors à fournir, ils suspendirent le chargement.

Ces retards dans le chargement, dûs à ce que le grain des appelants étaient dans des barges retenues par les glaces dans le canal Lachine, firent perdre au moins une journée et demie à deux jours de temps, c'est-à-dire plus qu'il n'en aurait fallu pour compléter le chargement. Il est prouvé que le chargement aurait pu être mis abord le mercredi soir, si les glaces n'avaient pas retardé l'arrivée des barges contenant le grain des appelants. L'arrimeur John Britt dit qu'il en a chargé

un de même capacité en 27 ou 28 heures.

Par suite de ces retards, et la saison étant très avancée, le commandant du steamer craignant de se voir retenu par les glaces et obligé d'hiverner en Canada, donna avis aux appelants qu'il laisserait le port, dimanche matin, 21 novembre sans attendre plus longtemps pour un chargement complet. Dans ces circonstances le propriétaire Davidson réclame les dommages qui furent stipulés par la charte-partie comme suit :

Penalty for non performance of this agreement, estimated amount of freight.

La somme de £313 représentant d'après la charte-partie la différence entre la quantité de chargement reçu et le chargement complet lui a été accordée par la Cour Supérieure dont le jugement a été confirmé. Bien que ce ne soit pas par refus ou négligence de leur part que les appelants n'ont point livré un chargement complet, cependant comme ils ne se sont pas mis en garde contre les accidents et les retards qui pouvaient empêcher leur grain d'arriver à temps, ils doivent subir la pénalité à laquelle ils se sont soumis sans condition.

Les intimés ont réclamé £100 pour surestarie (*demurrage*), mais cette somme leur a été justement refusée. Comme il n'y avait pas de délai fixé pour opérer le chargement, ce n'est pas à titre de surestarie (*demurrage*) mais à titre de dommage qu'ils auraient pu réclamer une indemnité pour délai dans le chargement, mais l'indemnité pour dommage ayant été réglée par la convention il n'y a pas lieu d'en accorder d'autre que celle qui a été convenue.

Par la dernière clause de la charte-partie, il est convenu que si durant le chargement, la glace mettait en danger la sûreté du bâtiment, le commandant aurait la faculté de partir avec ce qu'il aurait de chargement, et qu'il lui serait loisible de le compléter dans son voyage de retour pour le bénéfice du vaisseau. Cette clause ne

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peut pas être invoquée par les appelants, car il est clair d'après la preuve que sans les délais survenus dans le chargement, le vaisseau aurait pu laisser le port de Montréal avant le dimanche matin, 21 novembre, comme il a été forcé de le faire à cause du danger dont il était menacé par les glaces qui s'étaient formées en grandes quantités et menaçaient d'arrêter la navigation d'un moment à l'autre. Appel renvoyé avec dépens.

HENRY J.—The respondent, who resides in England, was on the 20th of October, 1880, the owner of a steamship called the "Whickham," then on her way with a cargo from Barrow, in England, to Montreal. On that day a charter party of affreightment was entered into between the parties to this action, as follows :—

CHARTER PARTY.

Montreal, 25th October, 1880.

It is this day mutually agreed between T. H. Davison, owner of the good steamship or vessel, called the "Whickham," of the measurement of about quarters capacity, 1,124 tons net register, or thereabouts, whereof ——— is master; now on way to this port with cargo from Barrow, and Messrs. Lord & Munn, of Montreal, merchants;

That the said ship being tight, staunch and strong, and every way fitted for the voyage, shall, with all convenient speed (with leave to take outward employment as above, and to coal at Sydney, C.B., outward or homeward) sail and proceed to Montreal at least ⅔ cargo to be wheat, maize, peas and "or" rye, or so near thereto as she may safely get, and there load, always afloat, from the said merchant's agents, a full and complete cargo of wheat and or maize, and or peas in bulk, and "or" rye or other goods; oats if shipped, and "or" barley, not to exceed ⅓ cargo, and "or" flour not exceeding 2,000 barrels; petroleum and its products excluded; (the vessel to line and dunnage and load under the inspection of the Port Warden as customary), which the said merchants are hereby bound to ship, not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions and furniture; and being so loaded therewith proceed to a safe port in the United Kingdom; or on the continent, between Havre and Hamburg inclusive, Amsterdam and its approaches excluded; (calling at Queenstown, or Falmouth, or Plymouth, at the master's option, for orders, which are to

be given the master within 12 hours of arrival, or lay days to count for detention beyond that time) or so near thereunto as she may safely get, and deliver the same always afloat at all tides on being paid freight in cash at the following rates, without discount or allowance, in full of all port charges, pilotage and dues:—

	Wheat, Maize, or peas, per 480 lbs.	Barley, per 400 lbs.	Oats, per 320 lbs.	Flour, per bar'l
	s. d.	s. d.	s. d.	s. d.
To the U. K. for orders or continent direct.....	6 3	5 3¾	4 10½	3
To the U. K. for orders to discharge on continent.	Ten per cent. additional.			
To the U. K. direct, orders on signing B. L.....	6	5 1	4 7¾	21 0½

Charterers option cancelling if not arrived here by 10th November.

If other lawful merchandise (petroleum and its products always excluded) be shipped, the charterers engage to pay the same total amount of freight as the ship would make with a full cargo of wheat at the above rates.

(The act of God, the Queen's enemies, restraints of princes, pirates, fire, damage by collision, leakage, vermin, sweating, and all and every other dangers and accidents of the seas, rivers, boilers and machinery and steam navigation, of what nature and kind soever, before and during the said voyage, being always excepted.)

Cash for ship's use at port of loading not exceeding £600 to be supplied on account of freight at the current rate of exchange, subject to insurance. Ten running days, sundays excepted, are to be allowed the same merchant (if the ship be not sooner despatched) for discharging; commencing from the time of ship being ready to deliver cargo.

Ship to be loaded as fast as can be received in fine weather and ten days on demurrage, over and above the said lying days at forty pounds per day; lighterage if any to be at merchants risk and expense.

If the vessel is ordered direct or from a port of call to any port on the continent where she may be prevented from entering owing to insufficiency of water, lay days are to commence from date of arrival in the roads, custom or alleged custom to the contrary notwithstanding. If ordered to London, cargo to be discharged immediately after the arrival of steamer, or the captain has the power to discharge it into craft and "or" land it at expense and risk of the consignees, but no discharge to the place after dark.

The ship to be allowed to call at intermediate ports for coaling or

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other purposes; to sail with or without pilots; to tow and be towed, or otherwise assist vessels, without prejudice to this charter.

The cargo to be brought to and taken from alongside the ship, at ports of loading and discharge, at merchant's risk and expense.

The captain to sign bills of lading at any rate of freight without prejudice to this charter, provided all difference of freight to the ship's credit be first paid him in cash.

The ship to have absolute lien on the cargo for all freight, dead freight and demurrage, due under this charter party, but charterer's responsibility to cease upon shipment of the cargo, provided the cargo be worth the freight, demurrage, &c., on arrival at the port of discharge. The vessel to be addressed at port of loading to Carbray Routh & Co., free of address commission.

A commission of five per cent. is due by the ship to Carbray Routh & Co., on the amount of freight, demurrage, &c., ship lost or not lost. Penalty for non-performance of this agreement, estimated amount of freight.

Should ice set in during loading so as to endanger the ship, master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward for ship's benefit.

The "Whickham" arrived and discharged her cargo at Montreal, and is alleged to have been ready to receive her outward cargo on the 15th of November. It is also alleged that a certificate of the Port Warden that she was so ready signed by him was before noon of that day served on the appellants. Such service is denied and there is no evidence to sustain the allegation of service beyond a statement of Mr. Routh, the ship's agent, that he sent it by a messenger before that hour.

By the usage and custom of the port the charterer is bound to commence loading on the day the notice is given, if served before noon, otherwise the obligation to commence loading is postponed to the following day.

The appellants continued the loading until the morning of the 21st, when the master refused, for the reasons that will hereafter appear, to take any more cargo.

It is shown that during the loading the weather was cold and stormy, with occasional falls of snow, which, to some extent, delayed the operation. On the 20th the

master of the "Whickham" gave notice to the appellants, that on account of the threatening state of the weather and ice beginning to set in, he had decided, for the safety of his vessel, to start in the morning of the following day, the 21st November, and he did so start. In doing so, I think, under the circumstances he was justified, as the evidence shows that had he remained longer there was risk of the vessel being frozen in port for the winter, or of being lost or damaged if she sailed. It is shown that she so sailed with a cargo short of her carrying capacity to the extent of two hundred and fourteen and a-half tons, amounting to £313 sterling for the freight. The respondents claim to recover that amount in the present action, together with £100 for demurrage under the clause in the charter party.

Ship to be loaded as fast as can be in fine weather, and ten days on demurrage. Over and above the said lying days at forty pounds per day.

It is generally the custom to insert in a charter party the number of days allowed for loading, and a provision for the rate of demurrage, if beyond the number of days specified. The charter party in this case was made by using a printed one with the necessary blank and filled in and altered by Mr. Routh. It seems to me that the provision for demurrage is wholly inapplicable to the circumstances in this case. No number of days was stated or agreed upon, but the ship was to be loaded "as fast as can be received in fine weather." It is clear that the clause in question which provides for "ten days on demurrage over and above the said lying days" cannot be reconciled with the provision that the master might sail with part cargo, if ice set in during the loading so as to endanger the ship.

Taking the whole of the charter party into consideration (which is the proper mode of construing it when

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the provisions are doubtful or antagonistic), I am of the opinion that demurrage was not intended to be provided for as part of the contract.

By the contract appellants undertook to load the ship as fast as she could receive the cargo in fine weather, and if the respondent has shown they did not do so and that the master was justified in sailing with part cargo, as I think he was, under the agreement, the respondent is entitled to damages for the cargo short shipped but not to demurrage. Demurrage is but liquidated damages by law or by agreement of parties. The respondent in this case claims both demurrage and loss of freight, but it is clear to me that if he is entitled to recover at all it is but damages for the loss arising by the short shipment of cargo.

The respondent charges substantially that the appellants thereto had commenced to load on the fifteenth of November and to continue uninterruptedly from such commencement to furnish cargo as fast as the ship could receive the same, and that had they done so the full cargo would have been loaded before the ship sailed, and inasmuch as she had to sail with a part cargo and the appellants having undertaken to provide a full cargo and failed to do so, they are liable to pay him for the freight short of what he was entitled to.

The appellants by their pleas, after denying everything contained in the respondents declaration, except as admitted by their pleas, allege that they were not obliged to commence loading, according to the usage of the port, until the sixteenth, on which day they commenced and continued during the working hours of that day; that from 7 o'clock, a.m. on the seventeenth they proceeded with the loading of rye until two o'clock in the afternoon, when they were stopped by the master; that when so stopped they had grain alongside more than sufficient to occupy the whole of said

day; that on the eighteenth snow fell from 2 o'clock, a.m. till 3 o'clock in the afternoon; that they had seven thousand bushels of rye then alongside, which the weather prevented their putting on board during that time; that on the nineteenth they worked in loading all day and all night, and the same on the twentieth, up to the time of the vessel's leaving; that they were obliged by the custom of the port to work in loading but eleven hours a day, and that the constant working during the nights of the nineteenth and twentieth more than made up for any loss of time in the loading that might be imputed to them, and that when the vessel sailed they had alongside sufficient rye and other grain to fill up the vessel.

The appellants further pleaded that under the agreement and the custom of the port the ship was bound to supply persons known as "baggers" to bag the grain as it was put on board, but did not supply a sufficient number or a sufficient number of stevedores, and thereby impeded the loading to the extent of the balance of the cargo unshipped, which was alongside ready to be shipped.

The respondent by his replication after a general denial of the allegations contained in the pleas specially denies that the appellants were only to work at loading eleven hours each day, but were bound by the charter party and by the custom of trade and port in such cases to load as fast as possible night and day.

He also specially denies that he failed to supply the requisite number of baggers and stevedores, and avers that he and his agents did their best and the utmost in their power to supply them, and specially denies that the appellants had alongside the vessel when she left Montreal sufficient rye and grain to fill her. I will deal first with the issues raised by the special denials in the replication.

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1st. As to the obligation of the shippers by the charter party and the custom of the trade and of the port to furnish cargo night and day, it is necessary to look at the evidence, the charter party being silent as to that point. I can find no evidence to sustain the respondent's contention as to the custom of trade or of the port. On the contrary the evidence shows that a master is not bound to receive cargo during the night, and he can refuse to do so at dark. Masters sometimes do so, but it is quite well understood they are not bound to do so. No custom can bind one party to a contract unless both are bound, and no binding custom can exist which depends on the option of one of two parties. Such being the case the appellants cannot be concluded under this contract, and assumed to have agreed to furnish cargo at night in the absence of a special contract to do so. They, when sought to be made answerable for the consequences of failure to ship a certain quantity within a certain number of hours, may fairly say: "we were only obliged to ship during eleven hours "each day, and we have shipped during as many hours "as we would have done had we commenced on the fif- "teenth and supplied cargo eleven hours every day." If my deductions from the evidence are correct the appellants made up all the time in shipping the cargo that they were bound to employ, a part of which too was stormy and not the fine weather mentioned in the contract, and therefore are not liable for damages for short cargo.

The fact may be suggested that the vessel left with only a part of her cargo and that the contract provided for a full one. So it did, to some extent, but we should not fail to consider the provision for the interests of both parties suggested by the lateness of the season, and the chances there were that the vessel might not be able to remain long enough to take in a full cargo.

It is obvious that the respondent would not run the risk of the ship being frozen up in the port, or hazard her safety by agreeing to wait long enough under any circumstances to take in a full cargo. He protected himself by the provision that he was to run no such risk, and stipulated that in case the vessel's safety required her to leave with a short cargo. She should have the right to call and fill up her cargo on ships account at any intermediate ports. Provision was, therefore, made not only to exonerate the ship for leaving before being fully loaded, but to earn the balance, if any, of freight by calling at any intermediate ports. The respondent by his master availed himself of the license to leave without a full cargo, and he had as a compensation for short freight the right otherwise to make it. Suppose he had secured the balance of freight after leaving Montreal, he could not then have had recourse upon the appellants even had they been guilty of delay in loading. I do not say, however, that he was bound to do so, or that his failure to do so would exonerate the appellants if otherwise liable, but it is an ingredient in the case to show that both parties felt when the contract was entered into, that owing to the lateness of the season the full loading of the ship might and would be impracticable within its provisions. The one party had therefore to run the risk of having only a part of his cargo shipped and the other that of having only a part of his chartered freight. The case is therefore different from one in which both have absolute rights, the one under any circumstances to furnish a full cargo and the other to wait a reasonable or stipulated time to take it on board. I admit liabilities in the one case as well as in the other, but they are in some points essentially different as to respondent's denial in respect of his alleged failure to supply a sufficient number of baggers and stevedores. His denial is at

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first positive, but it is materially weakened by the averment "that he and his agents and employés did "their best and the utmost in their power to supply a "sufficient number." Taking the whole together the reasonable deduction is that the baggers and stevedores were not supplied in sufficient numbers but that those representing the respondent did what they could to get them; and the evidence on the part of the appellants most clearly establishes the allegation in the plea, and I may add that to that evidence there is no substantial contradiction. The rate of taking in cargo, as admitted by the witnesses of the respondent, corroborates the statements of the witnesses for the appellants on that point, and the whole evidence on both sides leaves no doubt on my mind that if there had been all the time a sufficient number of baggers and stevedores the whole cargo might have been shipped before the vessel sailed. Griffiths, the shipping clerk of the appellants, was examined as a witness on the trial, and states that the day and night of the twentieth up to the time of the vessel leaving, 19,500 bushels were shipped, and that had there been a sufficient force of baggers and stevedores they could have loaded in that time at least 40,000 bushels. He stated:

> The delay was caused by the scarcity of general labour. It was through the small number of bag sewers and the scarcity of the general labour on the ship, of course the labour generally would be regulated by the number of sewers, but the first cause is the scarce number of sewers.

When asked:

> If there had been baggers enough on board the vessel to meet the grain, when could the loading have been finished, working as you did?

He replied:

> By Saturday afternoon.

His testimony on this point is sustained by that of several other witnesses. Pierre Boutet states that for

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five hours during the night of the 19th, the ship took on board 2,433 bushels, and that had there been baggers enough and the necessary labor on the ship they could have loaded 10,000 bushels.

Arthur Ritter, an engineer on board one of the elevators employed in loading the vessel, proves that 2,000 bushels an hour is about the usual rate to be shipped on board a steamship when there are sufficient baggers and others on board to receive it. He also proves they were delayed by the insufficiency of the baggers. He says that from five to nine o'clock of the morning of the 21st, the ship received but 1,318 bushels, and that "they could have bagged that in an hour if they men "enough."

W. Routh, the ship's agent, who was actively engaged about the loading being asked as to the delay alleged to have been caused by the small number of baggers, replied that he was continually present at the loading and could not answer that question, but he subsequently added:

I know we were constantly after the contractor for the baggers to obtain more men to expedite the ship.

Mr. Routh also states that with a sufficient number of baggers 2,000 bushels an hour may be loaded. When asked:

Was it possible to get more than a single gang of ten men, four boys and a foreman on Saturday night? Replied we were pushing Redden (meaning the contractor) and he assured us it was an impossibility.

It is obvious, taking the testimony of the appellants' witnesses, sustained as it is by by the statements of Mr. Routh, that delay was caused in the shipments by the ship not being able, through a sufficient number of baggers and others to receive the cargo as fast as it should have done, and that to that delay may be ascribed the failure to fill up. If the ship was to receive and stow the cargo as is always its duty, and that to perform

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that duty so as to receive the cargo with due promptitude, a certain class and amonnt of labor is necessary, and that it is not engaged in sufficient quantity to prevent unnecessary delay, the owner is answerable for the consequences, and it is no answer for him to make, that he did his best, but failed to obtain such labor there. In the evidence of Mr. Routh we have the admission of his contractor Redden that sufficient labor could not be procured; it is proved otherwise that the short loading of the ship was due to that failure, and that position is not substantially contradicted. Here then is a delinquency shown on the part of the ship, which, in my opinion, should estop her owner from making the complaint of delay he has done against the appellants.

It must not be forgotten that the respondent contends that the appellants were bound to work night and day in loading; they were bound to load within a reasonable time, working during the accustomed hours, and he was equally bound to receive the cargo at the usual rate. If by his default the ship did not receive it at such rate of speed and the ship had to leave wanting a part of her cargo, the blame must fall on the ship. He who requires promptness from others should not fail in it himself, and I cannot come to any other conclusion after a most careful consideration of the facts and circumstances in evidence than that the short cargo of the ship was caused by the failure of duty on the part of the ship and that but for such, any delay on the part of the appellants would not have prevented the ship from having a full cargo when she sailed. Under the evidence I have referred to, the charge at all events of contributory negligence is proved against the respondent. The loss he claims to recover for was at all events largely caused by his own failure to receive promptly, as he was bound to do, the whole cargo having to that

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extent contributed to the loss he cannot receive damages therefor from another.

The evidence has satisfied me that the whole cargo might have been shipped if taken on board as fast as it was tendered, but if I am wrong in that conclusion I am safe in saying that the evidence does not sustain the respondent's claim as one without such reasonable doubts as should be absent to entitle him to recover.

I am therefore of opinion that the appeal should be allowed and judgment entered for the appellants with costs.

TASCHEREAU J.—This action was instituted by the respondent, as owner of the S. S. "Whickham," for two and a half days' demurrage at £40 per day (£100. 0. 0.) and for dead freight (£313. 0. 0.) The judgment of the Superior Court allowed the dead freight but rejected the claim for demurrage. The appellants appealed from this judgment to the Court of Queen's Bench, (appeal side), and a cross appeal for the demurrage was taken by the respondent. The Court of Queen's Bench maintained the judgment of the Superior Court for £313, and rejected the appeal of the respondent for demurrage. From this judgment the appellants have appealed to this court. There is no cross appeal before this court by the respondent from the judgment dismissing his claim for demurrage. The question involved is one of fact, that is: as to whether the loading of the vessel at Montreal was delayed by the acts of the respondent or of the appellants. Whether, by the charter party the lay day or days on demurrage stipulated for therein apply to the loading or only to the discharging of the vessel is also in issue. The following are the facts of the case: The "Whickham" was chartered by the appellants by a charter party entered into between them as merchants and the respondent as owner on the

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twenty-fifth of October, 1880; by which it was agreed that the steamship then on her way to Montreal should proceed to Montreal, and there be loaded by the appellants with a full and complete cargo of wheat or rye or other goods at rates which are not in contestation. The penalty for non-performance of the agreement by the charterers was fixed at the estimate amount of freight or what is called dead freight. The charter contains this clause:

Ten running days, Sunday excepted, are to be allowed the said merchant (if the ship be not sooner dispatched) for discharging commencing from the time of ship being ready to deliver cargo.

Ship to be loaded as fast as can be received in fine weather, and ten days on demurrage over and above the said lying days at £40 per day. Lighterage, if any, to be at merchant's risk and expense.

Owing to the lateness of the season there was a special clause as to the time of the leaving of the ship, which read as follows:—

Should ice set in during the loading so as to endanger the ship, the master to be at liberty to sail with part cargo and to have leave to fill up at any open port on the way homeward for ship's benefit.

The vessel arrived at Montreal on the eighth of November, 1880. A verbal notice of the arrival was given on the following day to the appellants by the captain and Routh, the agent.

On the fifteenth the ship, having discharged her inward cargo, was examined by the Port Warden, according to the custom of the port, and his certificate of her readiness for cargo delivered before noon to the appellants who were then bound, according to the custom of the port, to begin loading at noon on that day. They, however, had no cargo ready, and the loading only began at one o'clock on the following day; one day being thus lost. The cargo brought alongside on this day was rye alone, and was put into the number two hold of the vessel, forward, at the request of the appellant's foreman. The loading continued up to five

o'clock in the afternoon of that day, and was re-commenced at seven o'clock on the following morning, the seventeenth.

The appellants continued loading rye into this forward hold until two o'clock in the afternoon when they were stopped by the captain, the safety of the ship being endangered by her being loaded down by the head. He accordingly refused to take any more cargo into this forward hold, and the appellants refused to put the rye, which was the only grain that they had, into any other of the holds of the vessel, as they wished to keep them for wheat alone. The appellants having no other grain ready, the loading of the vessel was stopped until eight o'clock on the morning of the nineteenth, when other grain came alongside, and the loading was continued at number two and three holds; and went on night and day until six o'clock on the morning of Sunday, the twenty-first, when the vessel sailed from the port in consequence of the setting in of the ice.

The respondent claims that the whole of the eighteenth and half of the seventeenth were thus lost by the failure of the appellants to supply grain; and that the loading of the vessel was thus delayed for one day and a half, besides the first day already mentioned. The respondent also claims that the vessel was not loaded at any time as fast as she could receive cargo; and had she been loaded from the time she was ready to take in cargo as fast as she could have received it, she would have been loaded with a full and complete cargo before sailing. When the vessel left she was two hundred and fourteen and a half tons short of a full cargo. The respondent therefore claims the freight upon these two hundred and fourteen and a half tons of cargo, at the same rate as though an equal quantity of wheat had been shipped, namely; at the rate of six shillings and three

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pence a quarter, amounting in all to the said sum of £313 sterling.

The master of the vessel on account of the threatening state of the weather and ice sailed on the morning of Sunday, the 21st. The evidence shows that he was perfectly justified in so doing. It was in fact the last ship from Montreal to get to sea that fall, and $100 extra had to be paid to the sea pilot to get her out from Quebec,

The plea to the action admitted the charter party, and the fact that the appellants were notified at or about mid-day on the fifteenth of November that the vessel was ready to receive cargo; but denied that they were obliged according to the custom of the port to begin loading until the sixteenth. The plea also admits the dates of the loading as given in the declaration, and the fact that the appellants were prohibited by the captain from proceeding with the loading on the seventeenth, inasmuch as he declared that it would be dangerous to continue. The appellants, however, state that at that time they had a large quantity of grain alongside the vessel more than sufficient to occupy the whole of that day; and that on Thursday, the eighteenth, snow fell from two in the morning till three in the afternoon. That they had seven thousand bushels of rye alongside of the vessel ready to be put on board, but that, owing to the weather, and to the danger which might be occasioned to the ship and the grain by putting the rye on board during the snow storm, it was impossible to continue loading on that day. That thereafter, that is from Friday morning, they continued loading the vessel, working day and night; although obliged solely, as they allege, to work during ordinary hours from seven A.M. to six P.M. and they claim that, by working all Friday and Saturday night, they thereby gave thirteen hours on each of said days, over and

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above the number of working hours which they were under the charter party obliged to ; and that by reason of such night work they made up any loss of time which might be imputed to them. And they allege that they put on board on the nineteenth sixteen thousand seven hundred and fourteen bushels of rye, twenty thousand nine hundred and seventy-four bushels of corn, and on the twentieth up to the morning of the twenty-first, twenty-one thousand eight hundred and six bushels of rye, and that when the vessel left on Sunday morning they had alongside sufficient rye and grain to completely fill her up.

The appellants also allege that during the progress of loading the vessel was bound to supply baggers, to bag the grain as it was put on board ; and that the master and owners entirely failed to supply the requisite number, and the putting on board of the balance of the cargo was thereby impeded.

On these grounds they therefore claim that the delay is not to be imputed to them, and that they are not responsible for the damage suffered.

Now as to the evidence. The Superior Court found that the appellants received the Port Warden's certificate before twelve o'clock on the fifteenth, and that they, by their negligence, lost ten working hours in not commencing to load the said vessel before one o'clock on the sixteenth. That finding is fully supported by the evidence.

With reference to the question as to upon whom the responsibility should fall for the loss of time from two o'clock on the seventeenth, when the loading was stopped by the captain's orders, up to eight a.m. on the nineteenth the evidence shows that the responsibility for the delay should fall on the respondent. It is proved by Britt and Routh, that if the loading had begun at noon on Monday, with a the full quantity of all kinds of grain,

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the ship would have been completely loaded by Wednesday night, or Thursday morning, without night work and that, even if the loading had been continued with all kinds of grain from the time it began on Tuesday, she would have had a full cargo by Friday morning.

The pretention of the appellants that the loading on the eighteenth was stopped on account of snow is not supported by the evidence. On their pretention as to their having made up the time which was lost by night work, it is clear that this extra work was rendered necessary by their former default and want of diligence As to their plea that they were delayed by the insufficient number of baggers, the evidence entirely fails to support it. They never made any complaint of the kind during the loading. It was only when sued by the respondent that they make known for the first time this grievance. They never thought of it before.

Now, as to the interpretation to be given to the charter party, it seems to me clear, as found by the courts below, that no lay days or days for demurrage were allowed for loading, and the advanced period of the season explains why. The ten days are for the discharging only. The appellants themselves understood it to be so when, in the course of the loading of the "Whickham" they told the master that they would never thereafter charter a ship for loading without lay days being specified in the charter. There can be no question as to the amount of damages. Art. 1076, C.C.

GWYNNE J.—The only question in this case appears to me to be whether the defendants were guilty of neglect in not furnishing the vessel with a full cargo and whether any and, if any, what portion of the quantity by which the cargo was short should be attributed to

plaintiff.

The true construction of the contract contained in the charter party I think is that the defendants were bound to furnish the ship with a full and complete cargo which was to be loaded as fast as it could be received in fine weather, but should ice set in so as to endanger the ship the master should be at liberty to sail with part cargo without the ship incurring any responsibility to the defendants, and for any deficiency in the cargo fairly attributable to the master under such circumstances, sailing with a short cargo, the defendants should not be responsible. The evidence sufficiently establishes that the master was perfectly justified in sailing when he did and the sole question is: Have the defendants been guilty of such default as subjects them to liability for freight upon the whole of the quantity by which the cargo was short, or is the deficiency fairly to be attributed, and if so, in what proportions to the plaintiff and the defendants?

I do not think it has been established that the Port Warden's certificate of the readiness of the ship to receive her cargo was served upon the defendants before noon of the fifteenth November. David Shaw, a ship agent, called by the plaintiff, said that in his opinion the proper way to serve it was for the captain to send a notice accompanying it to the charterers and that it must be served before noon to make the rest of the day count, and the only evidence of its delivery that we have is the evidence of Mr. Routh, who says that it was delivered at the defendant's office at or before noon on the fifteenth November, that it was sent under an envelope addressed to Lord & Munn by messenger to their office, but the messenger was not called nor any other evidence of the time of its delivery given than the above which leaves it in doubt whether or not the certificate was delivered before noon. The defendants'

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plea admits only that it was delivered at or about, (which might be after) noon, and contends that such a delivery did not put the defendants in default for not beginning to load on the same day, and I cannot say that I think this default has been sufficiently established. That the defendants were in default on the sixteenth, seventeenth and eighteenth November there can, I think, be no doubt, but the defendants contend that the fact of the vessel not having been laden to the full capacity before she left the port of Montreal is attributable to the default of the plaintiff, whose duty it was to provide baggers, in not providing a sufficient number of competent persons; that there was a difficulty in getting baggers at that season, and that the plaintiff failed in getting as many as were required, and that the captain tried to get, and that those whom he did get were chiefly, if not wholly, boys, the evidence I think does establish, and the difficulty appears to me to consist in determining whether the whole of the deficiency in the freight is to be attributed to the default of the defendants, or whether some, and if any, what portion of it is to be attributed to the default of the plaintiff. The default of the plaintiff is charged as having occurred upon Saturday, the twentieth, and there is evidence that but for the default of the defendants on the sixteenth, seventeenth and eighteenth, the vessel might have been completely laden on the eighteenth, and the plaintiff contends that notwithstanding any default of the captain in not supplying a sufficient number of competent baggers the vessel might at any rate have been completely laden before she left on the Sunday morning, until which day she was detained by the default of the defendants on the sixteenth, seventeenth and eighteenth November, and so for the convenience of the defendants. If this be so then the defendants are, I think, liable to the full amount of the deficiency, for

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their contract was to furnish the vessel with a full and complete cargo as fast as it could be received on board in fine weather, of which contract their neglect to furnish a sufficient quantity of grain on the sixteenth, seventeenth and eighteenth November, constituted a clear breach, and they cannot be relieved from their responsibility for the natural consequence of this breach by reason of default in the captain to supply a sufficient number of baggers on the twentieth.

The learned judges in both of the courts below who have pronounced their judgment in favor of the plaintiff were of opinion that, as matter of fact, the vessel might have been completely loaded long before the morning of the twenty-first November, when she left port, but for the default of the defendants on the sixteenth, seventeenth and eighteenth November, and I cannot undertake to say that this is an erroneous conclusion. I must concur, therefore, in dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Kerr, Carter & Goldstein.*

Solicitors for respondents: *Abbott, Tait & Abbott.*