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ALEXANDER CASSELS (DEFENDANT)... APPELLANT ;

* May 3.

AND

KENNEDY F. BURNS (PLAINTIFF)..... RESPONDENT.

APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Ship and Shipping—Charter party—Damage to vessel—Repairs—
Nearest port—Deviation—Breach of charter.*

In September, 1882, a vessel sailed from Liverpool, G. B., for Bathurst, N. B., to load lumber under charter. Having sustained damages on the voyage she was taken to St. John, N. B., for repairs, and when such repairs were completed it was too late in the season to proceed to Bathurst. In an action against the owner for breach of charter party the jury found that the repairs could have been made at Sidney, C. B., in time to enable the ship to go to Bathurst.

Held, that the jury having pronounced on the questions of fact, and their verdict having been affirmed by the Supreme Court of New Brunswick, this court would not interfere with the finding.

Held, also, that under such finding taking the vessel to St. John was such an unnecessary deviation from the voyage as to entitle the charterer to recover.

APPEAL from a judgment of the Supreme Court of New Brunswick (1), sustaining a verdict for the plaintiff and refusing a new trial.

On the 12th September, 1882, Kennedy F. Burns, the plaintiff, chartered the defendants ship, "Her Majesty,"

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

(1) 25 N. B. Rep. 13.

to carry lumber from Bathurst, N. B., to Liverpool. The ship sailed for Bathurst some ten days after the charter being then in good repair and on the way out encountered heavy weather. When near Cape Scat-
 terie, the eastern extremity of Cape Breton, the master of the ship decided that she would require repairs before going to Bathurst and took her to St. John to have such repairs made. Both Sidney and Port Hawkesbury were much nearer ports and if the repairs could have been made at either of those ports they would have been completed much sooner.

The ship went to St. John and seeing that it would be too late in the season to proceed to Bathurst after the repairs were finished the captain notified the plaintiff that the charter party would not be fulfilled and chartered her in St. John. The plaintiff thereupon brought an action for breach of the charter and obtained a verdict, the jury finding, in answer to questions submitted, that the repairs on the vessel could have been made at Sidney and completed in time to enable the vessel to load at Bathurst. The Supreme Court of New Brunswick refused a new trial. The defendant then appealed to the Supreme Court of Canada.

Skinner Q.C. for the appellant.

W. Pugsley for the respondent.

Skinner Q.C. having stated the nature of the appeal was stopped by the court.

Sir W. J. RITCHIE C.J.—I am afraid you cannot get along with this appeal. It has been laid down in this court, and in the Privy Council, that where a jury have passed on a question of fact, and their finding has been affirmed by the court, a court of appeal will not over-ride it.

The repairs could have been made at Sidney and the jury have found that it was not necessary to go to St.

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John and that had the ship gone to Sidney or Port Hawkesbury the repairs could have been made in time to enable her to carry out her contract. She put it out of her power to do that and I therefore think the court below was right upon the law and upon the facts as found by the jury.

Appeal dismissed with costs.

Solicitor for appellant: *C. N. Skinner.*

Solicitors for respondent: *Harrison & Rand.*
