THE FRANCESCA CURRO.

Case No. 5,029.

{4 Wkly. Notes Cas. 415.}

District Court, E. D. Pennsylvania. May 18, 1877.

CONSTRUCTION OF CHARTER-PARTY—COMMENCEMENT OF VOYAGE.

A vessel lying at Genoa was chartered for a voyage from Philadelphia to a British port, with the express stipulation that she should sail from Genoa during December. On Dec. 30, having procured all necessary provisions and papers for the voyage, she was unmoored and towed by a tug about three quarters of a mile, to the western side of the harbor opposite the roadway, where she again anchored. At the time a strong headwind prevented her

from going to sea, and she was unable to proceed for several days. *Held,* that although she remained under the jurisdiction of the local authorities, she had nevertheless broken ground for the voyage, and must be held to have "sailed" within the provision of the charter.

{Cited in Pedersen v. Pagenstecher, 32 Fed. 842.}

Libel for breach of charter party.

The respondents had chartered the bark Francesca Curro, then at Genoa, to sail from Philadelphia to a port in Great Britain, it being expressly stipulated that she should sail from Genoa during the month of December. The question in the case was whether or not this stipulation had been performed. It was shown by the testimony that the harbor of Genoa is semicircular, being about two miles in width from east to west, and one mile from north to south. The roadway for ingress and egress is between two moles extending towards each other in parallel lines from the eastern and western sides of the harbor and about a quarter of a mile apart Upon December 30, 1876, all the papers necessary for departure were obtained. The bark was then lying on the eastern side of the port, where is the anchorage for merchant vessels, with anchors fore and aft, and was on that day unmoored and towed by a tug to the western side of the port, opposite the roadway, for departure, a distance of about three quarters of a mile, where she anchored again. When this movement was made the wind was blowing dead ahead, and so continued for several days. The master knew he could not go to sea until the wind changed, and lay at this second anchorage within the harbor, and, presumably, within the jurisdiction of the local authorities until January 4, 1877, when he was taken out by a tug, and proceeded on the voyage. Upon the arrival of the bark at this port, the respondents refused to receive her. The cause was reargued May 17, before Cadwalader, J., and Captain Young, who had been requested by the judge to sit with him as an assessor.

Mr. Flanders, for libellant

It is admitted that the stipulation is a condition precedent, but it has been performed. Entire readiness to go to sea within the time fixed and an actual movement, however short the distance, in the prosecution of the voyage, is in contemplation of law a sailing if the delay arises from vis major. Arnould, Ins. p. 554; Maclachlan; Pitte-grew v. Pringle, 3 Barn. & Adol. 520; Bond v. Nutt, 2 Cowp. 607; Fisher v. Cochran, 5 Tyrw. 496.

Wilson & Ward, contra.

All the books require, besides readiness, a movement with the bona fide expectation of at once prosecuting the voyage. Arnould, Ins., supra; Phil. Ins. § 773. The case of Pittegrew v. Pringle, supra, does not apply, because the ship was not ready within the time fixed. In Bond v. Nutt, supra, and Earle v. Harris, 1 Doug. 357, there was an actual sailing of five miles. Fisher v. Cochran, supra, was especially confined by the court to similar cases, viz., time policies, where there was no terminus a quo, as in this case. The case which governs this is Nelson v. Salvador, 1 Moody & M. 309. The movement cannot have been with the bona fide intention of at once going to sea, because the master admits

he knew he could not do so. The direction of the movement throws no light upon the question of intention, because he could have gone in no other direction. On account of the nature of the harbor of Genoa the vessel could not be said to have been ready for sea until she had arrived at the second anchorage.

May 17, 1877. The assessor presented the following report:—.

The assessor in this case having read the testimony and heard the arguments of counsel, respectfully presents, That the bark Francesca Curro was lying in the port of Genoa, under charter to sail in Dec, 76, for Philadelphia or Baltimore. On the 30th of said month she got out from among the shipping, and proceeded about three fourths of a mile towards the mouth of the harbor, and anchored; the wind was blowing from southward and eastward, which was ahead for her proceeding to sea. It continued to blow from the same quarter for several days, so that the vessel was detained thereby; she might have gone to sea with two tugs, but as the vessel was in ballast only, she was not in a condition, nautically, to contend with a head wind, on a lee shore, particularly when taking into consideration the stormy season of the year, and the lateness of the horn, 3 P. M. It certainly would have been the height of imprudence for her to have gone to sea that day, say Dec. 30, 1876.

The question for the assessor is, was the moving of the vessel, say three-fourths of a mile, to be considered as commencing the voyage? The assessor is clearly of the opinion that it was not, but merely a shifting of berths, preparatory to getting ready for sea. Such ports as Marseilles, Pernambuco, Genoa, and many others, although small, are made capable of accommodating a large number of vessels, by the peculiar mode of arranging the same in "tiers," with two anchors out at the bow and two at the stern, what is "mooring head and stern." This method renders it imperatively necessary for vessels, when about ready to sail, to notify the harbor authorities thereof; the proper boats and number of men, with a pilot, are sent on board, who takes charge of the ship, gets up the anchors, unmoors the ship, and takes her to a convenient berth, anchors, and turns her over to the officers and crew. No vessel can be deemed as

ready for sea, from any such ports as the above, without several hours' detention, so that the anchors and cables may be properly secured, and many other things to be secured and prepared, which, in many instances cannot be performed prior to getting the ship out from among the crowd of vessels. The writer has been in many ports of the above description, and has never seen or known vessels to unmoor, get outside of the crowd of shipping, and go to sea the same day.

CADWALADER, District Judge. After the argument of this case, I asked one of the nautical experts on whom I frequently call to act as assessors, to read the papers, and let me know his opinion. I had no definite purpose to refer the case for his formal assistance. But he naturally understood the question to be such a reference, and has reported accordingly. The report may be filed.

I do not concur with him in opinion. The case, in my opinion, is less one for the decision of a nautical assessor than for consideration by the judge of a court of admiralty. I also think that the question to be decided is one rather of fact than of law. The vessel was not beyond the jurisdiction of the local authorities of the port of Genoa until the 3d of January. I am of opinion that she had, nevertheless, sailed before the end of December. Before the end of that month she was completely ready for sea, had on board all necessary papers, and had broken ground. This was not enough to constitute a commencement of the voyage. But there was in addition a certain progress made in the direction of her destination. This progress, though small, was measurable. It placed her near the mouth of the harbor, where the time, space and labor of ulterior progress were already abridged. This occurred on the 30th, and, in part of that day, and the whole of the 31st, she was only prevented by continuance of the headwind from running out. It may be that before the use of steam towage, she could not have made the progress which was actually made. But I cannot acquiesce in the suggestion that progress by the use of sails was indispensable. The commercial world is entitled to all the benefits of towage in modifying the definition of progress in such a case. Decree for libellants, with costs.

Oct 17, 1877. On appeal the case was argued by the same counsel. Decree affirmed, with costs.

{NOTE. See Wright v. Owners of the Francesca Curro, Case No. 18,088.}