

loaded, but such weather as was not reasonably fit or proper. This would exclude days when it was not reasonably safe to attempt loading with the appliances at hand, and when under the practice of the port loading was customarily suspended for that reason by competent men intrusted with the work, and acting upon their judgment of the fitness and safety of loading.

The master of the ship, and the superintendent of the loading, differ considerably as to the days they consider to have been fit for loading. The superintendent, however, was constantly engaged in the business of loading, was upon the spot, and his testimony as to each day relates to the condition of the sea in the shallow water near the jetties, where the lighters were obliged to take their loads from the beach. The master did not go to the jetties at all, though he went ashore almost daily at other points. The superintendent's testimony, therefore, seems entitled to the most weight. That the judgment of the men employed to load was fairly exercised, is confirmed by the further fact, to which the superintendent testifies, that other vessels that were loading at the same time and place, suspended loading during the same time that loading on the libellant's vessel was suspended on account of bad weather. The master, however, testifies positively that loading was going on upon the 28th day of December from 9 o'clock until 4; while the superintendent allows but four hours, saying that the rest of the time was bad. In this respect the master's record is most precise, and the respondents must be charged with the time that they actually worked. Computing the rest of the time upon the basis of the superintendent's testimony, I find the respondents chargeable with 5 days in loading and $1\frac{1}{2}$ days in discharging, making a saving, out of the 16 days and 10 hours allowed her, of $9\frac{1}{2}$ days, which, at the stipulated rate of £15 per day, entitles the respondents to a reduction of \$679.80. Decrees may be entered accordingly.

HARRISON v. ONE THOUSAND BAGS OF SUGAR.

(Circuit Court, E. D. Pennsylvania. May 27, 1891.)

1. CHARTER-PARTY—CONSTRUCTION.

Matter expunged from a printed form, used in drawing up a charter-party, can be considered in determining the intention of the parties thereto.

2. SAME.

A charter-party which provides that "freight" is to be paid "upon the unloading and right delivery of the cargo," "on intake weight," binds the charterer to pay freight on the whole cargo taken on board, although a portion of it was damaged, without the ship's fault, by an excepted peril, and sold on the voyage, when the remaining portion is rightly delivered, especially where the words "on intake weight" are substituted for the printed word "delivered," in drawing up the instrument.

In Admiralty. On appeal from district court. 44 Fed. Rep. 686, affirmed.

The steamer *Weatherby* was chartered by the claimant to carry a cargo of sugar from Hamburg to Philadelphia. On the voyage over half of the cargo was damaged by collision, an excepted peril, without fault of the ship, and was sold for the benefit of the charterer, who was also consignee. The latter paid freight on the portion delivered, but refused to pay freight on the portion damaged, and sold in the district court. A decree was entered against appellant for freight on all cargo taken on at Hamburg.

Morton P. Henry, for appellant.

Curtis Tilton and John F. Lewis, for appellees.

ACHESON, Circuit Judge. This suit is for the recovery of an alleged balance of freight due under a charter-party, whereby the steam-ship *Weatherby* was to be provided with a full cargo of sugar at Hamburg, to be transported thence to Philadelphia, perils of the sea excepted. Part of the cargo having been damaged by an excepted peril, without fault of the ship, was sold on the voyage for the benefit, and with the knowledge and assent, of the owners of the cargo. All the balance of the cargo was delivered at Philadelphia. The question here in litigation is whether freight is to be paid upon the entire cargo shipped, or only upon that portion which was delivered. The case turns altogether upon the construction of the charter-party. In making the contract the parties used the ordinary printed form of a freighting charter-party for the full capacity of the vessel, the printed clause, providing for the payment of freight, reading thus: "The freight to be paid on unloading and right delivery of the cargo at and after the rate of ——— per ton of 20 cwt. delivered." The printed word "delivered" was struck out by running the pen through it, and the words "on intake weight" were interlined in writing, so that the completed clause reads: "The freight to be paid on unloading and right delivery of the cargo at and after the rate of nine shillings per ton of 20 cwt. on intake weight." In the district court it was held that the contract bound the charterer to pay freight on the entire cargo taken in. The authorities bearing upon the subject are cited, and the case is carefully treated by Judge BUTLER in his opinion to be found in 44 Fed. Rep. 686. After an attentive examination of the authorities and serious reflection, I am satisfied that the decision of the district court rests upon a sound interpretation of the charter-party. Undoubtedly, for the purpose of ascertaining the real intention of the parties, it is competent for the court to look at what the printed form originally was, and to consider as well the word struck out as the words introduced. *Strickland v. Maxwell*, 2 Crompt. & M. 539. Now, I can come to no other conclusion than that the printed clause, as originally framed, was intended to limit the payment of the freight to so much of the cargo as was delivered. This, indeed, was the plain effect of the word "delivered," in the connection in which it stood. Why, then, was it stricken out, unless the parties intended that the freight should be paid on the intake weight of the whole cargo? The suggestion that the purpose of the alteration was simply to meet any discrepancy (if such there

should be) between the shipping and delivery weights, and secure the ship-owner freight calculated on the intake weight at Hamburg, seems to me to rest upon a conjecture which is wholly unsupported by any fact. Clearly, that purpose did not require the erasure of the word "delivered." The great difficulty in the way of accepting the construction insisted upon by the respondent is that the court is virtually asked to restore to the charter-party a material word which the contracting parties expunged, it must be presumed, intentionally and deliberately. But this we are not at liberty to do; and, giving to the act of the parties its legitimate effect, we must conclude that the clause, as it now stands, was meant to provide for the payment of full freight on the intake weight of the cargo. Nor does the provision that the freight is "to be paid on unloading and right delivery of the cargo" create any obstacle to a decree in the favor of the libellant; for, in the analogous cases of "lump-sum" freights, the principle has long been established that the cargo is rightly delivered if all of it not covered by any exception in the contract is delivered. *Shipping Co. v. Armitage*, L. R. 9 Q. B. 99. The decree of the district court must be affirmed; but in the decree to be entered in this court credit must be given for any dividend which may have been received by the libellant since the decree of the district court in the proceedings to limit the liability of the owners of the steamer Sultan.

THE B. F. BRUCE.

LUMBERMEN'S MIN. CO. *v.* GILCHRIST *et al.*

(*Troutt Court, N. D. Ohio, E. D.* December 30, 1891.)

1. CHARTER-PARTY—UNQUALIFIED OBLIGATION—EFFECT.

Unqualified charter-parties are to be construed liberally as mercantile contracts, and a party who has by charter charged himself with an obligation must make it good, unless prevented by the act of God, the law, or the other party to the charter.

2. SAME.

Respondents, ship-owners, entered into an absolute agreement with libellant, by charter, that they would, during a season of lake navigation, carry eight cargoes of libellant's iron ore from one port to another in a specified vessel, to be towed by another specified vessel. Two of the eight trips were not performed, and libellant employed other vessels at an advanced freight, and brought this suit to recover the difference of freight between the charter rate and the rate they were obliged to pay. Respondents averred that, after it appeared that the designated vessel could not make the eight trips, they had offered to supply other towage, which offered libellant refused. Also, that during the existence of the charter, one of the specified vessels was at times detained by other business. *Held*, that respondents, having by their charter entered into an unqualified undertaking possible to be performed, must make it good, unless performance was rendered impossible by the act of God, the law, or by the libellant, and hence that libellant was entitled to recover.

In Admiralty. Suit to recover damages for breach of charter. On appeal from district court. Affirmed.

Hurvey D. Goulder, for appellants.

Henry S. Sherman, for appellee.