

## THE PROGRESO.

STREET *et al.* v. THE PROGRESO.WATERBURY v. STREET *et al.*

(Circuit Court of Appeals, Third Circuit. May 24, 1892.)

## 1. CHARTER PARTY—EXCEPTIONS—"RESTRAINTS OF PEOPLE"—QUARANTINE.

Quarantine regulations which interfere with the charter engagements of a vessel are fairly within the clause of a charter excepting liability for results caused by "restraints of princes, rulers, and people."

## 2. SAME—DETENTION BY QUARANTINE—DUTY OF VESSEL WHEN QUARANTINE ENDED.

A vessel, having by charter agreed to be at a certain port by the 1st of October, "restraints of princes, rulers, and people excepted," and having been prevented from going there during October by quarantine regulations at such port, was held bound to have been at the port on the 1st of November, when she knew the quarantine would be raised.

## 3. SAME—OPTION OF CANCELLATION—WHEN EXERCISED.

A charter provided that if the vessel should not arrive at Charleston, her loading port, on or before a certain day, charterers should have the option of canceling the charter, option to be declared when vessel was ready to load. The vessel being delayed, her agents called upon the charterers, while the vessel was at Boston, to declare whether they would load or not. Charterers declined to exercise their option, whereupon the ship canceled the charter. *Held*, that such demand by the ship was premature, that charterers were not bound to exercise their option until the vessel was at Charleston, and that the ship was liable for any damages caused charterers by her breach of the charter.

42 Fed. Rep. 229, affirmed.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

In Admiralty. Libel by Thaddeus Street, Timothy Street, and Thaddeus Street, Jr., against James M. Waterbury, owner of the steamship Progreso. Decree below for libelants. Defendants appeal. Affirmed.

*J. Warren Coulston* and *Robert D. Benedict*, for appellants.

*J. Rodman Paul* and *N. Dubois Miller*, for appellees.

Before ACHESON, Circuit Judge, and WALES and GREEN, District Judges.

GREEN, District Judge. From the record in this cause, it appears that in the latter part of August, 1888, the appellant, James M. Waterbury, owner of the steamship Progreso, then on a voyage from Cuba to the United States, did, through his agents, Belloni & Co., of New York city, by a certain charter party, demise and let to freight his said steamship Progreso to the firm of Street Bros., of Charleston, the appellees. The charter party, after providing that the steamship should, with all convenient speed, sail and proceed under steam to Charleston, S. C., there to load from the charterers a full and complete cargo of cotton in bales, to be conveyed to Liverpool, contained also, *inter alia*, two clauses or provisions which are of importance in the determination of this litigation, and which read as follows:

"Should the steamer not arrive at her loading port, and be in all respects ready to load under the charter, on or before the first (1st) day of October,

1888, the charterers have the option of canceling the same, to be declared when vessel is ready to load. The customs and usages of the ports of loading and discharging to be observed, unless otherwise expressed." "The act of God, the queen's enemies, fire, epidemics, strike or lockout of stevedores' men, draymen, or press hands, stoppage or destruction of goods on railway or at press, restraint of princes or rulers or people, collision, any act, neglect, or default whatsoever of pilot, master, or crew, in the management or navigation of the ship, and all other damages and accidents of the seas, rivers, and steam navigation, throughout this whole charter party, being excepted."

From the evidence in the cause, it appears that the *Progreso*, having taken on board at Havana a full cargo of sugar, sailed thence direct for Philadelphia. Reaching the Delaware breakwater on September 3d, she was detained by the proper authorities for a few hours at quarantine, and subsequently, for several days, at the lazaretto below Philadelphia, finally arriving at the latter port on September 10th. On that same day, Belloni & Co., agents for the appellant, as stated, evidently having heard rumors of impending or existing quarantine regulations at Charleston, which possibly might interfere with the arrival of the *Progreso* at that port, wrote to Street Bros. to the effect that the ship would arrive at Charleston about the 20th of September with a clean bill of health, and asking if, under such circumstances, she would be in danger of detention at quarantine; expressly stating that they could not afford to send the ship to that port if she was to be quarantined. In reply to this communication, by a note under date of September 12th, Street Bros. notified Belloni & Co. that, after submitting their letter of the 10th September to the board of health, they were officially informed that the *Progreso* would not be permitted to come up to Charleston, because of the quarantine, until November 1st. Thereupon, Belloni & Co. ordered the ship to proceed to New York for repairs, and, declining to keep her idle until she could safely sail for Charleston, sought and obtained a cargo for an *ad interim* voyage from Norfolk, Va., to Bremen. She arrived at Bremen November 6, 1888. From Bremen she sailed to Hamburg; accepted there a return cargo to Boston, at which port she arrived December 19th. On December 20th, the day following, the *Progreso* being at Boston, Belloni & Co. made formal application to Street Bros. to exercise the option in the charter party reserved to them upon failure of the ship to arrive at Charleston on or before October 1st, by requesting a declaration from them whether they would load the ship if she then proceeded to Charleston, to which Street Bros. replied that they would insist upon and claim all their rights under the charter party. Belloni & Co. then finally declined to send the ship to that port, and Street Bros., conceiving themselves aggrieved by such action, filed their libel to enforce the recovery of such pecuniary damages as they claimed they had suffered thereby. Upon these facts the contention of the appellant is that by the very terms of the charter party the *Progreso* was not required to go to Charleston if restrained by "princes, rulers, and people," and that she was in fact so restrained, within the meaning of the charter party, by the enforced quarantine at that port; and, *secondly*, that if she was bound to go to Charleston, by the terms

of her contract, she fully complied therewith by the tender made immediately upon her arrival at Boston.

It may be taken as settled that "detention at quarantine" is fairly included in the scope of that clause in this charter party which has reference to the "restraints of princes, rulers, and people." Quarantine regulations and health laws, so called, although often affecting in their operation a direct and palpable regulation of commerce, are constantly made and prescribed by states, and even by local municipal corporations, and pass everywhere, unchallenged, as the result of a legitimate exercise of that police power which resides in sovereignty. Such regulations would be worthless unless the enforcement were sure; and such certainty of enforcement is attained by virtue of the power of the people, as exhibited and exercised through their governmental agents. It follows, then, that enforced obedience to lawfully-prescribed quarantine regulations is a "restraint" of natural liberty of action devised by and proceeding from the "people." The Progreso was therefore clearly entitled to the benefit of this exception as a valid excuse for her default in performance of those terms and conditions of her contract, which the quarantine regulations at Charleston deprived her of ability to perform. What, then, were those terms and conditions? With the performance of what part of her contract did this "restraint" so seriously interfere? By the charter party the ship had contracted to arrive at Charleston on October 1st. Doubtless, if her freedom of sailing had not been interfered with by the quarantine regulations of that port, she could readily have complied with her agreement. But the enforcement of these regulations made it simply impossible for her to arrive at that port at the date designated. Not until a month later, November 1st, would she be permitted to reach Charleston, as she had been notified. Not until then could she be ready to load. But on that day there would be, at least, no "restraint of people" to bar her movements, or cause further delay and detention. Quarantine regulations were then to be done away with: Then and after that time they were as if they never had been. The ship would be free to come and go at that port as she pleased. The plain and indeed only result, then, of these quarantine regulations, was to work a temporary retardation in and hindrance of the ship's movements. The "restraint" could be for a limited time only. It operated, it is true, to delay the arrival of the Progreso at Charleston until November, but then its force would be spent. For such delay, so caused; this clause in the charter party afforded ample excuse and protection to the ship. An unsurmountable barrier had been placed in her course to Charleston by the strong hand of the law. Until that barrier was removed, she was helpless to keep and perform that part of her contract which demanded her presence at the port of loading on October 1st. But, when the cause of her helplessness was removed, her ability to perform was restored to her. Nowhere in the record is anything alleged as excusing her nonperformance after that date. Under the admitted circumstances, her failure to arrive at Charleston on the date fixed for arrival is therefore wholly excusable. But no valid excuse existed or has