

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of  
Elliott and others v. Lord and others, from  
the Court of Queen's Bench, Canada, delivered  
8th March 1883.*

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Present :

LORD BLACKBURN.  
SIR BARNES PEACOCK.  
SIR ROBERT P. COLLIER.  
SIR RICHARD COUCH.  
SIR ARTHUR HOBHOUSE.

This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, in the Province of Quebec (Appeal Side), in an action by the Appellants against the Respondents to recover damages in the nature of demurrage for the detention of the Appellants' ship, the "Gresham," at Sydney, Nova Scotia, whither she had gone to load under a charter party dated the 12th of June 1872. Mr. Justice Torrance, as the Judge of the Superior Court for Lower Canada, Province of Quebec, District of Montreal, on the 21st May 1880, decided that the "Gresham" was unduly detained for 17 days, and condemned the Defendants in 850% damages, with interest and costs. This decision was reversed on the 21st of March 1882, by three of the Judges of the Court of Queen's Bench (Appeal Side), one Judge, Mr. Justice Cross, dissenting.

No objection was made in this appeal to the amount of the damages, and it was agreed before their Lordships by the Respondents' Counsel

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that, if the Appellants are entitled to recover damages, they are to be calculated for 17 days at the rate of 50% per day, as was adjudged by Mr. Justice Torrance.

The Appellants were the owners of a steamship called the "Gresham," and the Defendants were merchants trading at Montreal under the firm of Lord, Magor, and Munn. On the 12th of June 1873 the Plaintiffs, through Mr. John G. Sidey, their agent at Montreal, entered into a charter party with the Defendants for the hire of the "Gresham," then at Liverpool. The material part of it is as follows:—

"It is this day mutually agreed between J. G. Sidey, of Montreal, agent of the good steamship or vessel called the 'Gresham,' whereof \_\_\_\_\_ is master, of the measurement of  $\frac{1801}{1162}$  tons, or thereabouts, now in Liverpool, of the one part, and Messrs. Lord, Magor, and Munn, of Montreal, that the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Sydney or other port, or so near thereunto as she may safely get, and there load from the factors of the said merchant a full and complete cargo of coals, taking her turn with other steamers, but taking precedence of sailing vessels, and receive prompt despatch in loading and discharging, and to load and discharge always afloat."

The "Gresham," under the command of E. G. Bulkeley, the master, proceeded from Liverpool to Sydney, and arrived there on the morning of Saturday, the 19th of July 1873, when the master, about 9 a.m. on that morning, notified to Messrs. Archibald & Co., of Sydney, the agents of the charterers there, that she was ready to receive and load her cargo under the charter party. On the 25th of July a few bunker coals were shipped, but no cargo coals were shipped on board the "Gresham" until the 4th of August, on which day she began to take in cargo coals, and finished loading on the 13th. She was then compelled to leave with less than her full cargo by 300 tons, but no question arises as to this.

The Appellants in their declaration alleged that the Defendants did not according to the terms of the charter party load the "Gresham" with a full and complete cargo of coals, taking her turn with other steamers, but taking precedence of sailing vessels, and afford and give the said steamship prompt despatch in loading her cargo of coals. And the Defendants by their plea averred that they complied with the conditions of the charter party, and that the "Gresham" had her turn with other steamers, taking precedence of sailing vessels, according to the custom and usage of the port of Sydney, and had prompt despatch in loading at Sydney.

The material evidence upon this matter is that of Mr. Frederick N. Gisborne, the only witness called for the Defendants, and the entries in a shipping book of which he produced a copy, and which, he said, contained a complete history of the business done during the period to which they relate. Mr. Gisborne stated that he was the engineer of two or three coal companies at Sydney; that all vessels loading from the mines he was attending to were of necessity reported to him, and no other person had any right to enter reports of vessels. Each vessel was put down in turn in the book at the time it was reported, and they were loaded in that order. None of the steamships that were berthed or reported after the "Gresham" were loaded before her, and the "Hibernia" being reported before the "Gresham" was loaded before her. They gave the "Gresham" coal as fast as they could deliver it—as fast as facilities of the mines would allow—the facilities of the pier were greater than the production of the mines, and the vessels could have been loaded in a shorter time or with more despatch if the facilities at the mines had been better.

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The following is a copy of the entries in the shipping book :—

“ Extracts from Shipping Book.

“ 1873.

“ S.S. ‘ Kangaroo.’—Telegraph Cable Fleet.

“ Commenced loading, 19th July. Completed, 24th. Cargo, 761 tons.

“ S.S. ‘ Gresham.’—Reported, 22nd July. Commenced loading, 25th. Completed, 13th August. Cargo, 1,830½ tons.

“ Schr. ‘ Heroine.’—Arrived, 22nd July. Loaded, 24th. Cargo, 120 tons.

“ Schr. ‘ Fear Not.’—Arrived, 24th July. Loaded, 25th. Cargo, 52 tons.

“ Schr. ‘ Trial.’—Reported, 25th July. Loaded, 26th. Cargo, 41 tons.

“ S.S. ‘ Hibernia.’—Telegraph Fleet.

“ Reported, 19th July. Commenced loading, 30th. Completed, 5th August. Cargo, 1,901 tons.

“ Schr. ‘ Rebecca Ann.’—Arrived, 31st July. Loaded, 1st and 2nd August. Cargo, 192 tons.

“ S.S. ‘ Alpha.’—Completed discharging, 1st August. Commenced loading, 7th August. Completed, 16th. Cargo, 1,959 tons.

“ S.S. ‘ R. M. Hunton,’ took 143 tons bunker coal, 6th and 7th August.

“ S.S. ‘ Crosby,’ took 234 tons bunker coal, 11th and 15th August.”

It was explained by Mr. Gisborne that the three schooners, “ Heroine,” “ Fear Not,” and “ Trial,” occupied inside berths where no large steamers could lie, and the loading of them did not interfere with the loading of the larger vessels. But the “ Hibernia,” which was reported on the 19th July, did not commence loading until the 30th, and between the 24th and 30th only three small cargoes of 120, 52, and 41 tons respectively, were loaded, viz., on the 24th, 25th, and 26th. No coals were loaded on the three following days, and the loading of the “ Hibernia’s ” cargo of 1,901 tons was completed between the 30th of July and 5th of August. The loading of the “ Gresham’s ” cargo, 1,830½ tons, was completed between the 4th and 13th of August, only a few bunker coals having been

loaded on the 25th of July. These dates show the time within which it was possible to load the cargoes if the coals had been ready.

The arrival of the "Gresham" having been notified to the Defendants' agents on the 19th of July, the Plaintiffs were, by the terms of the charter party, entitled to a full and complete cargo of coals on that day. The Respondents' Counsel did not dispute that when the ship is ready to load the charterers must have a cargo ready, but he contended that they were not bound to do anything till the ship was in her turn, and it was not shown that she did not begin to load before the 5th of August because the cargo was not ready. The facts, however, are, that the Defendants employed the same person, the agent of the coal companies, to load the "Gresham" as was employed to load the "Hibernia." In consequence of the delay in getting the coals down from the mines, there was not a sufficient supply at the port by which the loading of the "Hibernia" was delayed. This deficiency of coals, and not the waiting for her turn, was the cause of the "Gresham" not sooner obtaining her cargo.

The Defendants undertook that the ship should receive prompt despatch in loading, and their Lordships are of opinion that they are responsible for this delay.

It is not necessary to consider whether the "Gresham" was thus delayed for the whole of the 17 days, it having been agreed that 850*l.* shall be taken as the amount of the damages. Their Lordships therefore will humbly advise Her Majesty to reverse the decree of the Court of Queen's Bench (Appeal Side), and to affirm the judgment of the Superior Court of the 21st of May 1880, with costs. And the Respondents will pay the costs of this appeal.

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