

The Harriman

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Appellant : The Harriman

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The Harriman - 76 U.S. 161 (1869)

U.S. Supreme Court The Harriman, 76 U.S. 9 Wall. 161 161 (1869)

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76 U.S. (9 Wall.) 161

APPEAL FROM THE CIRCUIT COURT

FOR THE DISTRICT OF CALIFORNIA

SYLLABUS

Performance of a contract of charter party to proceed to a distant port specified, made during a war and for the obvious purpose of furnishing articles to one of the parties to it, *held* not dispensed with by the fact, learned in the course of the voyage, that the whole purpose of the voyage was defeated by the changed condition of military operations, the language of the charter party having been

absolute in its terms and without provision for any contingency.

During the recent war between Spain and the Republics of Chili and Peru, the Spanish fleet being engaged in active hostilities in the South American waters against the ports of the enemy, required supplies of steam coal, and vessels were taken up on charter in San Francisco to convey cargoes for delivery at sea to the vessels of the fleet in aid of the hostile operations of blockade and bombardment of the Chilian ports.

Among these vessels taken up by persons watching the operations of the Spanish fleet was the ship *B. L. Harriman*, which was engaged in this service by a charter party, under date of May 4th, 1866, entered into between one C. J. Jansen, her owner, a merchant of San Francisco, and a certain Emeric, as freighter, also a merchant of that city.

The ship engaged her whole capacity to the freighter, and to take no cargo except from him or his agent, he stipulating

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to furnish a cargo of 786 tons of steam coal (already laden on board) and to pay

"for the use of said vessel during the voyage aforesaid, \$15 per ton, one-half to be paid here to C. J. Jansen of San Francisco, two days after the sailing of the vessel, and the other half to C. J. Jansen, of San Francisco, on receipt of cancelled bill of lading that the coal has been delivered."

The owner stipulated for the freighting and chartering of the vessel

"for a voyage from San Francisco to Cobija, Bolivia, or other ports in the Pacific, *the port of discharge to be named before the vessel sails from San Francisco*, such instructions to be given by letter in triplicate, which will contain the privilege which is hereby given, that if the vessel proceeds direct by the instructions given to Valparaiso, *the commanding officer of the Spanish navy will have the right to receive only a part of the cargo, the whole, or none, and to send her, if he desires, to another port in Chili, Peru, or the Chincha Islands*, and in that case, the vessel

will immediately proceed to the *port which will be named by said commanding officer*, and there complete her discharge."

The letter of instructions provided for in the charter party was given by the freighter to the master of the ship, under date of May 14, 1866, and says:

"I hereby name you the port of *Valparaiso*, Chili, as the first port you have to proceed to on leaving San Francisco, and when there, *to report yourself to the commanding officer of the Spanish navy*, who will have the right &c.;"

(pursuing the privilege contained in the charter party).

The instructions proceed:

"I herewith hand you a letter *for the commanding officer of the Spanish navy at Valparaiso which contains the bill of lading of your entire cargo of coal, endorsed to his order, a duplicate of this charter party, and of this letter.* "

On May 17th, 1866, before the ship sailed, the freighter addressed another letter of instructions to the master containing

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a copy of some instructions which he had himself received from Panama, and requesting the master to follow them so far as he could. They were thus:

"On receipt of this letter, if you have not attended to all our outstanding orders, you are requested to suspend operations until further ordered, including even the last one thousand tons of coal, for it is more than possible that the naval forces down there will have changed their base of operations. In case, however, you should have taken up a vessel before the present reaches you, then you must instruct the ship *to seek after the fleet between the port of Valparaiso and the Chinchas.* "

On the 19th of May, the freighter gave to the master the liberty to call at the *Chincha Islands*, if wind and weather or other circumstances favored his making them *without prejudicing the freighter's rights under the charter party and*

instructions. These islands are about 1200 miles north of Valparaiso, to which place, it will be remembered, that by the principal letter of instructions the freighter had directed the master to go.

After the ship sailed, the owner wrote a letter to the freighter, in which he says:

"In your charter of the ship *B. L. Harriman*, there is no provision made for the possibility of there being nobody to receive her (the ship's cargo) on arrival, nor do I know that the captain of the *Harriman* had your private instructions on this point. At the time of making the charter, we could hardly contemplate anything of the kind, hence the omission, and wish you will make some provision in the event such should be the case, and instruct me how to act, that I may communicate same to Captain Swenson."

During the period of this transaction, war existed between Spain and Chili. The cargo was intended for the admiral of the Spanish fleet, then supposed to be operating against Valparaiso. The ship sailed from San Francisco May 22, and on *May 24 the fleet left the coast of Chili and went to parts unknown, and did not return there.* The ship arrived at the Chinchas

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August 3, 1866, and was there informed of the bombardment of Callao by the Spanish fleet May 2, that the fleet had been badly shattered and had sailed away; that a regular mail steamer from Valparaiso reported at the Chinchas that all was quiet at Valparaiso and that nothing was known of the fleet. The master also proved that the coal would have been seized at the Chinchas if he had betrayed the objects of the voyage, as the feeling was very bitter, and that he believed the coal would have been instantly seized at Valparaiso.

The ship returned to San Francisco without having ever gone past the Chincha Islands. Being now in San Francisco, the owner offered to deliver the cargo there to the freighter, on payment of freight according to the charter party. Payment of freight was refused by the freighter, and the cargo was demanded by him, which was refused except on payment of freight. The owner sold the cargo, and the

freighter libeled the ship for the value of the cargo, and to recover back the amount paid under the charter party at the outset of the voyage, as so much freight paid in advance. The owner justified the sale under his lien for freight, claiming the unpaid charter money and a return freight at the same rate for the home voyage.

The district court sustained the owner's right and lien for the unpaid charter money, but rejected the claim for freight on the return voyage, and, as a result gave a decree against the vessel for the balance of the proceeds in the owner's hands from the sale of the cargo, after satisfying the lien as allowed.

The circuit court rejected the right and lien of the owner to the charter freight, and gave a decree for the proceeds of the cargo, sold, and the charter money paid at the outset of the voyage.

The claimant appealed to this Court.

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MR. JUSTICE SWAYNE stated the case, and delivered the opinion of the Court.

This is an appeal in admiralty from the decree of the Circuit Court of the United States for the District of California.

The charter party, which lies at the foundation of the controversy bears date on the 4th of May, 1866. The parties to it were Jansen, the claimant, and owner of the ship, and Emerick, the freighter. Both parties were merchants of San Francisco. The entire capacity of the ship was engaged to the freighter. He stipulated to furnish her a cargo of

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786 tons of steam coal, and to pay

"for the use of said vessel during the voyage aforesaid, \$15 per ton in United States gold coin, one-half to be paid here to C. J. Jansen, of San Francisco, two days after the sailing of the vessel, less two and one-half percent discount for

cash, and the other half to C. J. Jansen, of San Francisco, on receipt of cancelled bill of lading that the coal has been delivered."

The owner stipulated

"for a voyage from San Francisco to Cobija, Bolivia, or other ports in the Pacific, the port of discharge to be named before the vessel sails from San Francisco; such instructions to be given by letter in triplicate, which will contain the privilege which is hereby given that if the vessel proceeds direct by the instructions given to Valparaiso, *the commanding officer of the Spanish navy will have the right to receive only a part of the cargo, the whole, or none, and to send her, if he desires, to another port in Chili, Peru, or the Chincha Islands,* and in that case, the vessel will immediately proceed to the *port which will be named by said commanding officer,* and there complete her discharge."

In pursuance of the condition of the charter party, Emerick, on the 14th of May, 1866, addressed a letter to Swenson, the master, in which he said:

"I hereby name you the port of Valparaiso, Chili, as the first port which you have to proceed to on leaving San Francisco, and when there to report yourself to the commanding officer of the Spanish navy, who will have the right to take only a part of your cargo of coal, the entire cargo, or none, and if he desires, to send you to another port in Chili, Peru, or the Chincha Islands, in which case you will have to proceed immediately to the port named by said commanding officer, and there complete your discharge, these conditions and privileges being part of the charter party. I herewith hand you a letter for the commanding officer of the Spanish navy at Valparaiso, which contains the bill of lading of your entire cargo of coal, endorsed to his order."

On the 17th of May, Emerick addressed another letter to the master in which he gave a copy of the instructions he had received from Panama, which were as follows:

"On receipt of this letter, if you have not attended to all our outstanding orders,

you are requested to suspend operations until further ordered, including even the last one thousand tons of coal, for it is more than possible that the naval forces down there will have changed their base of operation. In case, however, you should have taken up a vessel before the present reaches you, then you must instruct the ship to seek after the fleet between the port of Valparaiso and the Chinchas."

He added: "As far as it is in your power, you are requested by me to follow the above instructions." On the 19th day of May, Emerick gave the master permission to make the Chincha Islands if circumstances should be favorable, without, however, prejudicing his "rights under the charter party, and instructions."

On the 22d of May, the vessel left San Francisco for the port of Valparaiso. She was freighted according to the charter party. On the 16th of June following, Jansen said to Emerick by letter of that date,

"In your charter of the ship *B. L. Harriman*, there is no provision made for the possibility of there being nobody to receive her (the ship's cargo) on arrival, nor do I know that the captain of the *Harriman* had your private instructions on this point. At the time of making the charter, we could hardly contemplate anything of the kind, hence the omission, and wish you will make some provision in the event such should be the case, and instruct me how to act, that I may communicate same to Captain Swenson."

Emerick made no reply. The ship proceeded to the Chincha Islands, and returned thence to San Francisco. Captain Swenson, in his protest, says that on the 4th of August he took a pilot on board and ran in near to the southernmost of those islands, and "lay in close to the land." He went ashore and learned that the Spanish fleet had hauled off from the Chilian coast and gone upon an unknown destination. After diligent inquiry, he became satisfied that any attempt to find the fleet would be "impracticable and fruitless." He became satisfied also that it was necessary to return at once to San Francisco, and took his departure the same

day on his return voyage. He considered his original

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voyage broken up by the withdrawal of the Spanish fleet and the absence from Valparaiso of its commander, the consignee of his cargo. Upon the return of the vessel, Emerick refused to pay the balance of the freight money. Jansen thereupon landed and sold the cargo. Emerick filed this libel, seeking thereby to recover back the freight money he had paid and the value of the cargo. The owner proved that at the time the charter party was entered into, war existed between Spain and Chili; that the cargo was intended for the admiral of the Spanish fleet, then supposed to be operating against Valparaiso; that on the 24th of May, the Spanish fleet left the coast of Chili and went to parts unknown, and did not return there. He proved by the master the facts stated in his protest, and further that he was informed at the Chincha Islands of the bombardment of Callao by the Spanish fleet; that the fleet had been badly shattered, and had sailed away. The master feared his coal would be seized at the Chincha Islands if he betrayed the object of his voyage. The feeling there was very bitter. He believed the coal would have been instantly seized at Valparaiso.

Thus the case stood upon the proofs. The district court decreed for the owner. The circuit court decreed against him, and he has brought the case to this Court for review.

In settling the rights of the parties, the inquiries which demand our attention are what was the contract between them? Was it fulfilled by the ship, and if not was the nonfulfillment excused by fault or waiver on the part of the charterer or by other facts disclosed in the proofs, so as to entitle the owner to all or any part of the freight money stipulated for in the charter party?

According to that instrument, the destination of the vessel was to be fixed by letter before her departure upon her voyage. If it were Valparaiso, the commanding officer there of the Spanish fleet was to be the consignee, with the right to direct the ship to proceed further and deliver all or a part of her cargo elsewhere. By the

charterer's letter of the 14th

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of May, Valparaiso was designated as the port to which she was first to proceed.

This destination was not subsequently changed either in fact or according to the understanding of the parties. Emerick's letter to the master of the 17th of June, requested him to search for the Spanish fleet between Valparaiso and the Chincha Islands, but it gave no intimation of a purpose or willingness that he should abandon the voyage to Valparaiso, as originally prescribed, and certainly no authority to that effect.

The charterer's letter of the 19th of May, authorizing the master to make the Chincha Islands, expressly reserved his rights "under the charter party and instructions."

Jansen's letter of the 16th of June admits that the vessel had sailed for Valparaiso and asks instructions as to the disposition of the cargo if the Spanish commander should have left there before her arrival. The master states in his protest that his destination, upon leaving San Francisco, was Valparaiso. He went no further than the Chincha Islands, which were short of that point about twelve hundred miles. He made no search for the fleet between the two points, and gave no reason for breaking up the voyage and not proceeding to the port of delivery but the probable absence of the consignee and the peril there to ship and cargo.

The existence of the war was known to both parties when the contract was entered into. The owner made no provision against any contingency. His engagement was simple, direct, and unconditional that the vessel should proceed to Valparaiso. The presence or absence of the consignee was immaterial. If absent, it was the right and duty of the master to place the cargo in store. [[Footnote 1](#)] The contract was not fulfilled. For this the shipper is in nowise responsible. Such are the relations of the parties.

The contract of affreightment is governed by the same principles as other special contracts. There are none to which these principles are more stringently applied. The

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contract is an entirety, and where there has been no complete fulfillment on one side and no fault or waiver on the other, no freight money can be recovered. Mr. Justice Story says this is the result of all the cases. [[Footnote 2](#)]

In *Paradine v. Jane*, [[Footnote 3](#)] the court said:

"When the party by his own contract creates a duty or charge upon himself he is bound to make it good if he may notwithstanding any accident by inevitable necessity, because he might have guarded against it by his contract."

Such has always been the rule of the common law. If a lessee covenant to repair, and the house is burned down, he is bound to rebuild. If a party covenant to build a bridge and keep it in repair for a specified time, and it be swept away by an extraordinary flood before the time expires, he must replace it. A party agreed to secure in England for another the exclusive right to make, use, and vend in the Canadas a machine covered by a patent from the United States. It was found that this could only be done by an act of the British Parliament. As such a grant, however improbable, was not impossible, it was held that the case was within the rule laid down in *Paradine v. Jane*, and that the covenantor was liable for the breach of his agreement. [[Footnote 4](#)] If a condition be to do a thing which is impossible, as to go from London to Rome in three hours, it is void, but if it be to do a thing which is only improbable or absurd, or that a thing shall happen which is beyond the reach of human power, as that it will rain tomorrow, the contract will be upheld and enforced. [[Footnote 5](#)]

The principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. [[Footnote 6](#)] Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse

nonperformance. [[Footnote 7](#)] The answer to

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the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts -- not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function.

A charterer agreed to load a ship at Liebeau with barley. The ship went there to receive the cargo. The factors of the shippers informed the master that the Russian government had forbidden the exportation of barley, and that no loading could be furnished. The ship returned in ballast. The charterer was sued for the breach of the contract. Lord Kenyon said:

"I am decidedly against the defendant upon the point of law. It is said in Coke Littleton (1), that if a man be bound in an obligation to A., conditioned to enfeoff B., a stranger, and B. refuses, the obligation is forfeited, for the obligor has taken upon himself to make the feoffment. The reason of this is clear. If a man undertake what he cannot perform, he shall answer for it to the person with whom he undertakes. *I am always desirous to apply the settled principles of the law to the regulation of commercial dealings.* [[Footnote 8](#)]"

A charterer covenanted to freight a ship at Gibraltar with a homeward cargo. A pestilent disease broke out there, and all public intercourse was forbidden by law. The cargo could not have been put on board without danger to all concerned of contracting and communicating the disorder. Lord Ellenborough said:

"If in consequence of events which happen at a foreign port the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved nor is he excused for not performing it, but must answer in damages. [[Footnote 9](#)]"

An owner, by a charter party, agreed that his ship should proceed from Liverpool to Terceira and deliver her cargo. Terceira was under blockade, and both parties

knew it. There was no intention to break the blockade. The ship

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did not go. The owner was held liable. The rule laid down in *Paradine v. Jane* was cited and approved. [[Footnote 10](#)]

A ship was chartered to proceed from Charleston to Rotterdam. She went to London, and the master learned that if she proceeded to Rotterdam she would be liable to seizure there and on the way, and to confiscation, under a decree of the Emperor Napoleon for having touched at a British port. The master refused to proceed, and landed the cargo. Lord Ellenborough said: "Freight could only be earned by performing the terms of the charter party." The goods "were brought here, instead of being conveyed to their port of destination." [[Footnote 11](#)] This case, in its essential points, is strikingly like the one under consideration.

In *Lorillard v. Palmer*, [[Footnote 12](#)] the vessel sailed on a voyage from Richmond to New York. Finding the Chesapeake Bay blockaded so that it was impossible to proceed without capture, she returned to Richmond. It was held that the shipper was entitled to receive back his goods without paying any freight.

A ship was chartered for a voyage from the City of New York to the City of St. Domingo. The later was found to be blockaded. The ship was turned away by a blockading vessel, and returned to New York. It was held that the charter party was dissolved, "and all claim to freight under it gone." The court said: "Nor is this a case for *pro rata* freight. Here was no acceptance of the cargo at an intermediate port." It was added that the owner of the ship may make himself liable for freight by accepting the goods short of the port of destination upon the grounds of an implied contract resulting from the partial transportation of the goods and the benefit received.

"But when the cargo, as in the present case, is brought back to the port of lading, no such presumption can arise. No benefit has accrued to the owner, nor has he done any act from which an implied contract to pay any freight can be raised. [[Footnote 13](#)] "

There is nothing in the record to excuse the conduct of the vessel or to entitle the owner to any part of the stipulated compensation.

It is unnecessary to pursue the subject further. We think the decree of the circuit court was in all things correct, and it is

Affirmed.

[[Footnote 1](#)]

Fisk v. Newton, 1 Denio 45.

[[Footnote 2](#)]

The Nathaniel Hooper, 3 Sumner 555.

[[Footnote 3](#)]

Alleyn 26.

[[Footnote 4](#)]

Beebe v. Johnson, 19 Wendell 500.

[[Footnote 5](#)]

Comyn's Digest 96; Rolle 420, l. 20.

[[Footnote 6](#)]

Touteng v. Hubbard, 3 Bosanquet & Puller 300.

[[Footnote 7](#)]

2 Parsons on Contracts 672; *Beebe v. Johnson*, 19 Wendell 500.

[[Footnote 8](#)]

Blight v. Page, 3 Bosanquet & Puller 295.

[[Footnote 9](#)]

Barker v. Hodgson, 3 Maule & Selwyn 271.

[[Footnote 10](#)]

Mederos v. Hill, 8 Bingham 235.

[[Footnote 11](#)]

Osgood v. Groning, 2 Campbell, 466.

[[Footnote 12](#)]

15 Johnson 14.

[[Footnote 13](#)]

Scott v. Libby, 2 Johnson 336; see also *Abbot on Shipping* 596; *Smith v. Wilson*, *ib.*, 267, 469; *Lidard v. Lopez*, *ib.*, 453; *Benner v. Equitable Ins. Co.*, 6 Allen 222; *Chase v. Alliance Ins. Co.*, 9 *id.* 311; *Atkinson v. Richey*, 10 East 531; *Vliebroom v. Chapman*, 13 Meeson & Welsby 230.

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