1920
June 15.
Aug. 12.
1921
Jan. 3.

NOVA SCOTIA ADMIRALTY DISTRICT

JOHN S. DARRELL & COMPANY.....PLAINTIFFS;

AGAINST

THE SHIP *AMERICAN*

Shipping—Domicile—Jurisdiction—Action in rem—Owner of cargo—Breach of charter-party—Undue delay to repair—Abandonment of voyage—General average—Elements of damage.

Held, that the domicile of a corporation is its principal place of business, i.e., the place where the administrative business of the corporation is carried on; and, where it is shown that a company has no seal or original records in Canada and no share certificates appear to be held there, it cannot be said that such a company is domiciled in Canada, although such company, owners of the ship, has its registered office in Nova Scotia, where it may be sued.

2. The *A.* was chartered to carry a cargo of coal from Halifax to Bermuda and the freight was paid in advance. She sailed on the 14th January, but on account of weather and the bad condition of her pumps, boilers and machinery, she returned to port on the 15th. Nothing substantial was done to get the ship ready for sea again until January 26. The cargo owners were not notified or consulted as to what was being done with the cargo or the probable repairs necessary, but were informed from time to time that the ship would sail in a few days.

Held, that, upon the facts, the cargo owners were justified in bringing the action when they did against the ship for breach of charter-party.

3. That in the event of such delay being due to the underwriters on the hull, as between the charterers and the owners, the latter were liable therefor.

(1) [1916] 19 Q.P.R. 174. (2) [1901] 4 Q.P.R. 178.

4. The *A.* by counter-claim asked that the cargo contribute certain alleged average charges and that the same be set off against the plaintiff's claim.

Held, that inward pilotage, tugs, wharfage, cost of unloading cargo, protest fees, were proper general average charges, but that the cargo should not contribute to expenditures for wages and provisions.

5. That the forwarding of the cargo was abandoned by the ship and that she was liable therefor and for damages, and that the cargo owners were entitled to recover the costs thereof, freight paid and insurance, etc.

ACTION for damages for breach of charter party, motion to set aside warrant of arrest, for want of jurisdiction and hearing on application for assessment of damages and offset by the ship for general average charges.

June 8th, 1920.

Motion now heard before the Honourable Mr. Justice Mellish.

W. C. Macdonald, K.C. for plaintiffs.

C. J. Burchell, K.C. and *J. L. Ralston, K.C.* for the ship.

The facts are stated in the reasons for judgment.

MELLISH L.J.A., the 15th June, 1920, delivered judgment.

By a charter-party dated 24th December, 1919, Caracanda Bros., of New York, therein described as owners of the ship *American* undertook to carry coal in said ship from Halifax to St. Georges, Bermuda.

The plaintiffs have arrested the ship for breach of this agreement under the statute empowering such arrest unless an owner is domiciled within the jurisdiction.

A company called the Steamer American Limited, incorporated under the laws of Nova Scotia, moves as owner, to set aside all the proceedings taken herein, on the ground that this company is *domiciled* within the jurisdiction within the meaning of the statute see (24 Vict., cap. 10, s. 6—Imperial 1861 and The Colonial Courts of Admiralty Act, 1890; Imperial 53-54 Vict., c. 27, s. 2).

I am not satisfied on the evidence before me that this company is so *domiciled.* The domicile of a corporation is a fiction as shewn by Prof. Dicey. And although the company which is said to own this ship has its registered office in Nova Scotia and apparently may be sued here this would

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not appear to be decisive. The company under the evidence has apparently no seal or original records in Canada; and no share certificates appear to be held in Canada. The domicile of a trading corporation is defined (Dicey, Conflict of Laws, 2nd ed., p. 160), to be

> its principal place of business, i.e., the place where the administrative business of the corporation is carried on;

Under the evidence before me such place does not appear to be in Canada.

It was contended on behalf of the company that it might have two domiciles, here and abroad, and that as it could be sued here, it was domiciled here—the purpose of the act being to allow proceedings against the ship only where an owner or part owner could not be sued. I do not agree with this interpretation. The residence of a natural person within the jurisdiction, but who was domiciled abroad, would not, I think, avail to prevent action against the ship even though he might be an owner or part owner of the vessel. Dicey says:

> liability to be "sued" does not in the case of a corporation, any more than of an individual depend directly upon domicile. They may each be sued in the courts of this county, if amenable to the process of our courts. On the whole, the better opinion seems to be that a corporation has, following the analogy of an individual, one principal domicile at the place where the head of its affairs is to be found, and that the other places in which it may have subordinate offices correspond, as far as the analogy can be carried out at all, to the residence of an individual.

It does not appear that the directors of the company have anything in fact to do with the employment or management of the ship. On the contrary, whatever their legal powers may be, they appear to have allowed parties out of the jurisdiction to act as ostensible owners. Under such circumstances, it would perhaps not be just to allow the company to deny the ownership as being in the parties representing themselves to be such in the charter-party.

This decision however is based on the other ground which I have dealt with but even if I considered such ground I would not feel justified especially in a summary application in setting aside the proceedings on the facts before me. The application will be dismissed.

July 20th, 1920.

The action was now heard on the merits.

The facts are stated in the reasons for judgment.

MELLISH L.J.A. now this 12th day of August, 1920, delivered judgment.

On the 24th of December, 1919, Caracanda Bros., of New York, representing themselves as owners of the defendant ship entered into a charter-party with Musgrave & Company, Limited, of Halifax, acting as agents for undisclosed principals the plaintiffs in this action to carry a cargo of coal in bulk from Halifax to St. Georges, Bermuda.

The ship was loaded at Halifax and the freight paid in advance in accordance with this agreement. On January 14, 1920, the ship sailed on her intended voyage. On account of meeting with bad weather the ship returned to Halifax on the following day leaking, with her pumps choked, boilers and machinery in bad condition. On her return to Halifax the ship was listed to port fifteen degrees. She had proceeded about 65 miles on her voyage before turning back.

Messrs. I. H. Mathers & Son, of Halifax, who had been acting as the ship agents I think promptly advised Caracanda Bros. of the ship's return. One of the scrap log books produced as well as the evidence of the master shows that a survey of the ship was held on the afternoon of the 19th when the cargo was ordered to be discharged, with a view no doubt of ascertaining the ship's condition. A second survey seems to have been held on the 25th. Such discharge was not commenced until the 27th January, and finished on the 3rd of February, at Pier 9 when the ship was removed to Henry's wharf. This appears from another log book produced by defendant and marked, J. L. B./E from which it appears that repairs were being done at this wharf on the 4th, 5th and 6th. On February 7th the ship entered the dry dock returning to Henry's wharf on the 10th of February. On the following day it appears from this book that an examination was held on the ship's hull and boilers. The chief engineer's log ends on January 23, and is unsatisfactory. The master says that the engineer's log book was washed overboard but there was one produced at the trial which is not very instructive as to the repairs, which was not completed until after the engineer left the ship. On the engineer's recommendation to the master, a boiler-maker came aboard, and put stoppers in the main

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boiler, apparently an urgent necessity, this was done he says the third day after the ship's return, and the ship's engineers also did some repairs as appears by the engineer's log book. Beyond this, I think I am justified in finding that no repairs were begun on the boilers, pumps or machinery until after the ship was taken to Henry's wharf on February 3. There is no entry showing the ship was under repairs before that date, and the master swears that nothing was done till after the cargo was discharged.

In my opinion there was undue delay in discharging the cargo, and in commencing the permanent repairs, even if they were begun while the ship was discharging. I am unable to determine just what repairs were necessary or the precise dates on which they were effected. I see no reason why the repairs commenced at Henry's wharf apparently on February 4, were not begun at least a week earlier. Practically nothing was done to get the ship ready for sea again from the time of her arrival on January 15 until the 26th, when she was taken to Pier 9, with the exception of what was done by the ship's engineers and the urgent work already referred to which was done at the suggestion of the chief engineer. The treatment of the cargo owners was I think, to say the least, improper and unbusinesslike. They were not notified or consulted as to what was being done with the cargo and were not informed as to what repairs would probably be necessary, if indeed anyone took the trouble to definitely find out, which is not at all clear. They were informed from time to time that the ship would sail in a few days. The captain says that before the survey he expected to be detailed only for a couple of weeks. There is no evidence of any survey which would lead to any contrary conclusion.

It is hinted in the evidence that the owners were delayed in doing what was needful, by reason of the action, or rather the inaction of the underwriters on the hull. As between the charterers and the owners, I think the latter are liable for such delay.

I think the plaintiffs by reason of the delay of the owners were justified in bringing the action when they did against the ship for a breach of the charter-party. I further think there has been shown no legal justification as against the

plaintiffs for failure to perform the charter-party up to the present time. There will be judgment for the plaintiff for damages to be assessed with costs. On the assessment of damages, the amount to be determined, will depend upon circumstances, taking into consideration the method of handling the cargo, and the question as to whether the voyage was abandoned or such other questions as may be relevant.

November 16th, 1920.

The action now came on before the court on the question of assessing the damages, etc.

MELLISH L.J.A., on the 3rd of January, 1921, delivered judgment.

During the trial of the action the defendant ship was still at Halifax, and after the commencement of the trial, viz: on 3rd August, 1920, the cargo by consent was sold by the Registrar and the proceeds of the sale paid into court. This, after payment of certain storage charges and expenses, amounted to $4,958.37.

The defendant by leave has filed a counter-claim, claiming against any funds in court in respect of the cargo contribution for certain alleged general average charges, and that the same be offset against any claim of the plaintiffs.

The following are admitted to be proper general average amounts:

Inward pilotage	$ 43 80
Tugs	105 00
Five days wharfage	47 50
Cost of unloading cargo	1,558 40
Protest fees	27 50
Amounting in all to	$1,782 20

It is difficult, I think, to find the precise principles on which general average claims are dealt with in a case of this kind, the ship having come to a port not to repair general average damages; but I think I am within the English authorities in disallowing the expenditures for wages and provisions as claims to which the cargo should contribute. With some doubt I have come to the conclusion that the expenditure for insurance for say one month is probably chargeable to the cargo. I fix this amount at $100. I

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understood plaintiffs' counsel was willing to concede liability for storage of the cargo for one month. This, I think, an ample allowance; indeed no one could suggest why the cargo was not reloaded into the ship as soon as she was taken from the dry dock. This sum amounts to $76.20. In addition I think the cargo liable for top charges (wharfage) which I understand is charged in respect of providing accommodation for the cargo irrespective of the time it was to remain there. The side wharfage, $38 will be allowed in general average. Pickford & Black's claim for wharfage $95 I allow in general average to the extent conceded, viz: five days. As I have already indicated in my previous findings I think the ship should have proceeded to discharge cargo some days before she did.

The ship has been sold at Halifax and realized $19,250 which was paid into court.

I find that the forwarding of the cargo was abandoned and that the ship is liable for the cargo and for damages accordingly to the plaintiff, which I assess as follows:—

Cost of coal to plaintiff	$ 7,262	04
Freight prepaid	7,628	19
Expenditure necessary to procure cargo at Bermuda—		
Insurance	118	72
Cables	53	24
	$15,062	19
Plaintiffs have also lost the use of their money, or rather their coal, and any possible profit they might make on the transaction. I fix this at	700	00
	$15,762	19

which will be subject to the deductions hereinafter referred to.

The cargo was sold expressly without prejudice to either of the parties and that circumstance must not, I think, therefore be considered as evidence of the abandonment of the contract or of the acceptance of such abandonment; but I can find no justification for the long delay except on the theory that the undertaking to forward the cargo was abandoned as a business enterprise. The owners may have intended to forward the cargo if they had been financially able to do so, but that circumstance cannot, I think, better their position *quo ad* the plaintiffs the forwarding of whose

coal was I think wrongly given up as a commercial proposition before the coal was sold.

Admittedly the ship was sold after her being repaired for $19,250. It is difficult under the evidence to determine her value before being repaired but I think for the purposes of this action to place such valuation at say $12,000 or thereabout, would be right.

There is some evidence that the cargo was damaged by salt water before being discharged. The cargo would also suffer damage from wastage and breaking up of the coal and exposure necessary to its being discharged and reloaded, especially at that time of the year. Having in view the price for which the coal sold, $5,300, and the market conditions when such sale took place, I think I must hold that if the cargo had been reloaded in a reasonable time and delivered at Bermuda it would perhaps not intrinsically but as a marketable commodity have been diminished in value from the foregoing causes to the extent of one thousand dollars. Placing the damage from sea water before discharging to $500 leaves $500 a subject of general average.

As between the parties to this action and having in mind the counter-claim, I think the cargo should contribute in general average on the above valuation of $15,062.19 less $500 estimated for damage thereto from salt water,—$14,562.19. Valuing the ship at about $12,000 as above stated the contribution will be 55 per cent for the cargo and 45 per cent for the ship.

There must therefore be deducted from the plaintiff's claim:—

Fifty-five per cent of $1,782.20 admitted as proper subject of general average		980 21
One month's storage of cargo		76 20
Top charges (wharfage)		228 60
One month's insurance		100 00
Fifty-five per cent side wharfage, $38 one month		20 90
Loss in value of coal which would be occasioned by discharging and reloading	$500 00	
Less amount which would be chargeable to the ship in general average 45 per cent	225 00	
		275 00
Estimated water damage		500 00
Total deductions		$2,180 91

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Taking this from the above mentioned $15,762.19 leaves a balance of $13,581.28, for which plaintiffs will have judgment with costs. There should I think be no costs on the counter-claim.

Judgment accordingly.