

QUEBEC ADMIRALTY DISTRICT

THE CORPORATION OF THE TOWN } PLAINTIFF;
 OF WESTON }

1924
 Feb. 5.

vs.

THE STEAMER *RIVERTON*.....DEFENDANT.

Shipping—Bill of Lading—“Weight unknown”—Carriage—Evidence of delivery—Burden of proof—Recovery against ship for shortage—Customs Duty paid thereon.

W. sued for an alleged shortage in the delivery of a cargo of coal received by the *R.* for delivery at Montreal. The *R.* contended that by reason of the words “weight unknown” in the bill of lading *W.* was obliged to prove not only that they had received less than the amount stated in the bill of lading, but also that the ship had received the full quantity, and should have examined the weighers who put the cargo on board.

Held: That whatever effect should otherwise be given to the words “weight unknown” in a bill of lading for coal, where the Master of the ship stated in evidence that the said bill of lading showed the actual weight taken on board, and the consignee proved that the quantity delivered to him was less than was stated in the bill of lading, the onus was upon the ship-owner to establish that the weight in the bill was wrong; this he may do by showing mistakes by the tally-men from whose tallies the bill of lading was made out, or by indirect evidence sufficient to satisfy the Court, beyond reasonable doubt that he delivered all he received.

2. That in such a case, where the ship-owner has failed to prove that the quantity mentioned in the bill of lading was not in fact put on board, the ship was bound to deliver the full quantity stated in the bill of lading; and that the Consignee having paid the shipper for the full quantity, was entitled to recover against the ship the proportion of the purchase price represented by such shortage.
3. That although the Consignee might be entitled to claim a refund of the amount erroneously paid for Custom duty on such shortage from the Custom’s authorities, it cannot be claimed as an element of damage against the ship; and that likewise amounts overpaid for handling and discharging cargo should be claimed against those employed to do the work, and not against the ship.

ACTION for alleged shortage in delivery of cargo of coal received by steamer defendant for delivery at Montreal.

November 26, 27, 1923, and January 28, 1924.

Case now heard before the Honourable Mr. Justice MacLennan at Montreal.

A. R. Holden K.C., P. P. Hutchison and J. Howard Gray for plaintiff.

A. W. Atwater K.C. and L. Beauregard for defendant.

The facts and questions of law involved are stated in the reasons for judgment.

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MACLENNAN, L.J.A. this 5th day of February, 1924, delivered judgment.

The plaintiff's action is for alleged shortage in the delivery of a cargo of coal received by the steamer *Riverton* at Cardiff, Wales, for carriage and delivery at Montreal under a bill of lading issued on behalf of the master to the Bank of Montreal or assigns and assigned to the plaintiff. The quantity stated in the bill of lading is 4,187 tons 13 cwts., and plaintiff claims that there was a shortage in delivery at Montreal of 447 tons 17 cwts and 32 lbs. The plaintiff paid the shipper for the bill of lading quantity and paid duty, storage, wharfage and handling charges thereon at Montreal.

The defence is that the bill of lading contained a qualification
 weight unknown
 and further

freight for the same prepaid as per Charter-party dated 15th August, 1922, all the terms and exceptions contained in which charter are hereby incorporated.

The Charter-party was between the owners of the steamer and the agents for the charterers, in which it was agreed that the steamer *Riverton* should proceed to Cardiff and there load a full and complete cargo of nominated coal not exceeding 4,400 tons nor less than 4,000 tons, and being so loaded should proceed to Montreal and there deliver her cargo on being paid freight at the rate of 13 shillings and 6 pence per ton of 20 cwts. or on bill of lading quantity, and contained the further provision:—

The bills of lading shall be prepared in accordance with the dock or railway weight in form endorsed on this charter and shall be signed by the master, agent or owner, weight unknown, freight and all condition as per this charter. Such bills of lading to be signed at the charterers' or shippers' office, within 24 hours after the steamer is loaded.

The defendant further alleges that the *Riverton* proceeded to Cardiff and took on a full cargo of coal, bills of lading were signed for the master by Sir R. Ropner & Company, Limited, as agent, weight unknown, and that the statement contained in the bill of lading that 4,187 tons 13 cwts were shipped was the statement by the shipper, who was the charterer, for the purpose of freight only (which was paid in advance) and was not an acknowledgement by the ship defendant that the weight was correct; that the steamer

proceeded to Montreal and there delivered all the cargo which had been put on board her at Cardiff; that none of the cargo was jettisoned, lost or consumed for the steamship's purposes and all the cargo received was delivered.

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The evidence at the trial establishes that there was a shortage of 447 tons 17 cwts. and 32 lbs., the total quantity delivered being 3,739 tons 15 cwts. and 80 lbs. Before the trial the defendant examined the master and chief engineer of the *Riverton*. According to the bill of lading, in addition to the cargo, the ship received at Cardiff 858 tons 17 cwts. of bunker coal for the ship's use independent of the cargo. The cargo and bunker coal were both of the same kind. Both were brought alongside the ship by the Great Western Railway. The coal was weighed alongside the ship by the railway weighers and went directly from the weighing machines into the ship. An official representing the owners was present throughout the loading and weighing. The master produced a statement (Exhibit D-9) of the cargo and quantities as weighed when the ship was loaded which was given to him by the railway weighers and which the master says was subject to check afterwards. This statement shows the cargo consisted of 4,177 tons 13 cwts. The checking was done after the ship sailed and before the bill of lading was issued. In the cross-examination of the master there is the following evidence:—

Q. All the coal that was weighed went into the ship?

A. Yes.

Q. Did you get any other statement of the weights apart from this exhibit D-9?

A. Yes, I got it on the bill of lading when I got out here. The bill of lading shows the same practically. It was sent out to me to meet me here.

Q. The weights put into the bill of lading you had also obtained from the railway weighers?

A. From the head of the railway office.

Q. That the bill of lading would be made out after the checking had been done, that you refer to?

A. Yes.

Q. Am I right that the bill of lading shows the actual final weight taken just as the coal was loaded into the ship?

A. Yes.

Q. You or some of your officers or crew are present at the time that the coal is weighed and loaded into the ship?

A. Yes.

Q. Were you present yourself this time?

A. I was aboard the ship all the time. I did not see it weighed.

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Q. If you did not somebody did on your behalf?

A. There are proper officials for that purpose. There is a superintendent at the ship all the time.

Q. A superintendent on behalf of the owners?

A. A superintendent engineer.

Q. What is his name?

A. Mr. Dyack, or something like that.

Q. Employed by the owners of the ship?

A. Owners' representative, yes.

The master also testified that this representative of the owners would have a record of the weights, but he was not called as a witness, and his record of the weights was not offered in evidence.

Statutory declarations by the master, 2nd officer and chief engineer of the *Riverton* were filed at the trial in each of which it is stated:—

(2) That the said steamship (*Riverton*) was chartered by Charter-party on the fifteenth day of August, nineteen hundred and twenty-two (1922) for a voyage from Cardiff or Barry to Montreal for a full and complete cargo of coal not exceeding 4,400 tons nor less than 4,000 tons, freight to be paid in advance;

(3) That the said steamship took on board at Cardiff a full cargo of coal and sailed from Cardiff on the sixteenth day of September, 1922, at 1 a.m. and arrived in Montreal on the fifth day of October, 1922, at 7.15 a.m. and there delivered the said cargo alongside the Dominion Coal Company's wharf;

(4) That the said freight was paid in advance, and upon quantities shipped and weighed before being put on board, and bills of lading issued and freight paid upon the quantities so established;

(5) That none of the said cargo of coal was jettisoned, lost, or consumed for the steamship's purposes, and all of the cargo received on board has been delivered upon the wharf aforesaid in Montreal.

The Charter-party provided that the owner shall furnish, if required, a statutory declaration by the master and other officers that all the cargo received on board has been delivered. These statutory declarations of the master, 2nd officer and chief engineer go far beyond the requirements of the Charter-party in that respect and in very formal terms state, that the ship was chartered to carry a full and complete cargo of coal not exceeding 4,400 tons nor less than 4,000 tons; that she took on board a full cargo of coal (which must mean a cargo between 4,000 and 4,400 tons and the bill of lading quantity was within these limits); that freight was paid upon the quantities shipped and weighed before being put on board and bills of lading issued upon the quantities so established.

The freight paid as appears by the receipt on the face of the bill of lading was at the rate stated in the Charter Party and upon the bill of lading quantity which these statutory declarations state was

shipped and weighed before being put on board.

This is a very formal admission of the master and his two officers, that the bill of lading quantity was actually put on board.

The chief engineer of the *Riverton* filed two statements purporting to show the quantity of coal consumed by the steamer on the voyage from Cardiff to Montreal and on the return voyage from Montreal to Marseilles. When the steamer arrived at Cardiff she had 44.5 tons of bunker coal; she took on board there 858 tons 17 cwts. of bunker coal, and on arrival at Marseilles, on November 13, 1922, she still had 197 tons 17 cwts. bunker coal. The quantity used by the ship, according to the chief engineer and the master, from the ship's arrival at Cardiff until her arrival at Marseilles, was 705 tons. If the ship used more than that quantity for bunker purposes, some of the cargo must have been used.

After the trial the plaintiff applied to the court to reopen the case for the purpose of examining expert witnesses on the question of the quantity of coal which would be necessary for the operation of the ship from the time she arrived at Cardiff until her arrival in Marseilles. A witness, holding a first-class marine engineer's certificate and who had been seventeen years at sea during two of which he had been chief engineer, testified that after examination of the consumption of coal statements filed by the *Riverton's* chief engineer and examination of the engine room log book and the chief officer's log book for the *Riverton's* voyage out to Montreal and back, in his opinion, after giving the ship benefit of all possible doubt, she would have used 931 tons bunker coal instead of 705 tons, and possibly she might have used as much as 1,091 tons. His testimony is corroborated by that of a master mariner who has had over thirty years experience and who testified that, in his opinion, the quantity of bunker coal claimed to have been used on the *Riverton* during these two voyages is very much underestimated and that, if he were master of a ship

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and an engineer brought him these consumption sheets, he would say they were not true. The defendant examined a marine engineer and a master mariner to support the contentions of the defendant as to the quantity of coal used by the steamer, but the evidence of the two experts called on behalf of the plaintiff is entitled, in my opinion, to greater weight than that of defendant's experts.

At the trial counsel for defendant submitted that the quantity of cargo stated in the bill of lading was merely the statement of the shipper and was put into the bill of lading for the purpose of calculating the freight and that, having regard to the words

weight unknown

in the bill of lading, there was no presumption against the owners that the quantity stated in the bill of lading had actually been received and put on board, and in support of this proposition counsel cited among other cases: *New Chinese Antimony Company Limited v. Ocean Steamship Co., Ltd.* (1).

It appears to me that the evidence of the master and the statements contained in the statutory declarations filed by him and two of his officers destroy whatever effect should otherwise be given to the words

weight unknown,

and the authorities cited on behalf of defendant are not in point. Before the bill of lading was issued the weight of the cargo had been ascertained, the railway weights had been checked by an officer who superintended the loading on behalf of the owners, and the master testified that the bill of lading shows the actual final weight taken just as the coal was loaded into the ship. The owners' representative who superintended the loading is proved to have been in possession of a record of the weight. He was not called as a witness. No attempt was made to show that any mistake was made by the men who were doing the weighing of the coal as it was delivered into the ship. The experts examined on behalf of plaintiff, if their evidence is to be accepted, and I can see no reason why it should not, establish that more bunker coal was used for the ship's purposes than the officers of the ship admit. The cargo

(1) [1917] L.R. 2 K.B. 664; 86 L.J.K.B. 1417.

coal was the same kind of coal as the bunker coal and it was not a difficult matter for the engine room staff of the steamer to get at the cargo and appropriate a portion of it for the steamer's purposes. Having regard to the whole of the evidence, I am not satisfied that the defendant has established beyond reasonable doubt that no portion of the cargo was used for the purpose of the ship on the voyage from Cardiff to Montreal, and therefore it is not sufficient for the ship's officers to say in general terms, without showing any mistake by the weighers, that they delivered in Montreal all the cargo which they received at Cardiff. The admissions of the master placed the burden of proof on the defendant to establish that the quantity mentioned in the bill of lading was wrong, but there is no evidence in the case to suggest any mistake in the quantity admitted by the bill of lading and by the master.

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In *Sanday v. Strath Steamship Company* (1), Greer J., said:—

All these cases of short delivery turn on inferences of fact and not on rules of law. The rules of law are quite clear. They are as follows: (1) A plaintiff claiming damages for short delivery must, like any other claimant, prove his case. (2) It is sufficient to entitle the plaintiff to succeed if he proves the delivery of a less number or weight or measure of goods than that which is admitted in the bill of lading. This proof puts the onus on the ship-owner to establish that the number, weight or measure admitted by the bill of lading is wrong. (3) He may do so by direct evidence showing that a mistake was made by the tallymen, from whose tallies the bill of lading was made out. (4) He may do so by indirect evidence, sufficient to satisfy the tribunal of fact beyond reasonable doubt, that none of the goods were lost or stolen after receipt, and that he delivered all that he received.

This decision was affirmed on appeal by Bankes L.J., Warrington L.J., and Scrutton L.J.

As the defendant has failed to prove that there was in point of fact a short shipment and that the bill of lading quantity was not in fact put on board, the ship was bound to deliver in Montreal the full quantity stated in the bill of lading: *McLean v. Fleming* (2), and *Smith v. Bedouin Steam Navigation Co.* (3).

The plaintiff paid the shipper for the bill of lading quantity and is entitled to recover the proportion of the pur-

(1) [1921] 90 L.J.K.B. 1349 at p. 1351. (2) [1871] L.R. 2 H.L. Sc. 128; 25 L.T. 317.

(3) [1896] A.C. 70; 65 L.J.P.C. 8.

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chase price represented by the shortage of 447 tons 17 cwts. and 32 lbs., which amounts to one thousand and seven pounds thirteen shillings and ten pence, equivalent at the proved rate of exchange to \$4,454.01.

The plaintiff includes in its action claims for duty, wharfage and handling charges on the shortage. Duty was paid to the Canadian Customs on the bill of lading quantity before the cargo was discharged and before the shortage in delivery was discovered. As soon, however, as the shortage was known it appears to me that the plaintiff was entitled to claim a refund of the duty paid on the shortage. That claim would be against the Customs authorities and cannot be maintained against the ship. The same observations apply to any overcharge made to plaintiff for handling and discharging the cargo. If plaintiff paid more than it should have paid, its claim for reimbursement should have been made against the persons who were employed to discharge the cargo and not against the ship. The item in the action for freight on the shortage was abandoned at the trial.

There will therefore be judgment against the ship and her bail for \$4,454.01, with interest and costs.

Judgment accordingly.

Solicitors for plaintiff: *Meredith, Holden, Hague Shaughnessy & Heward.*

Solicitors for defendant: *Atwater, Bond & Beauregard.*
