BRITISH COLUMBIA ADMIRALTY DISTRICT.

1911

July 13.

PARRATT & CO.; HIND, ROLFE & CO.,

PLAINTIFFS;

AGAINST

THE SHIP *NOTRE DAME D'ARVOR.*

Shipping—Charter-party—Sale of cargo—Locus standi of charterers after sale—Dispute between charterers and purchasers of cargo—Delay occasioned by dispute in discharging cargo—Right of ship to demurrage.

The plaintiffs, R. R. & Co., were charterers of a ship, but before action brought by them for a breach of the charter-party resulting in damage to a cargo of cement, they had sold the same. By the terms of sale the cargo was sold as a "full cargo," the sale being subject to the condition "that the buyers are only bound to accept cement delivered in good merchantable condition." P. & Co., together with the plaintiffs R. R. & Co., were jointly in possession of bills of lading duly endorsed by the shippers and were also parties to a general average bond given by them to the owners of the ship wherein they were shown to be owners or shippers of the cargo.

Held, that under the facts set out, the charterers had a substantial interest in litigation arising out of the failure by the owners of the ship to properly carry the cargo.

2. When the ship arrived at her destination the consignees declined to pay freight except on the cement that was in good condition, and the ship was delayed in discharging the cargo. The master declined to continue to unload under his lien for freight pending a settlement of the dispute.

Held, that while the ship was entitled to be paid the freight when the cargo was in 'slings alongside,' the master had not acted unreasonably in declining to unload under his lien, and the ship was entitled to demurrage under the circumstances.

THIS was an action brought by Hind, Rolfe & Co., and Parratt & Co., of San Francisco against the ship *Notre Dame d'Arvor* for damage to cargo and for non-delivery or wrongful delivery of cargo at the port of discharge. The ship counterclaimed for demurrage and detention.

1911

PARRATT & CO. v. THE SHIP NOTRE DAME D'ARVOR.

Argument of Counsel

Hind, Rolfe & Co. chartered the *Notre Dame d'Arvor* at Antwerp to load cement to be delivered at Astoria, Wash. This was a joint project of Hind, Rolfe & Co., and Parratt & Co. Shortly after leaving port the *Notre Dame d'Arvor* had a collision with the English ship *Rathwaite;* part of her cargo was jettisoned and part sold at Falmouth, England. She put back to port and was repaired. In an action in the English Admiralty Court, arising out of the collision, it was decided that the *Notre Dame d'Arvor* was not to blame, the action against her was dismissed and she was allowed her counterclaim. On leaving again, she came into contact with the breakwater at Falmouth whereby some of her plates were opened up and further damage to cargo ensued. During the voyage a portion of the cargo was sold to Balfour, Guthrie & Co. and by them to R. V. Winch & Co. Balfour, Guthrie & Co. by their contract were only obliged to accept such portion of the cargo as might be in good condition. The ship's destination was diverted from Astoria to Victoria, where a portion of the cargo was discharged and she proceeded to Vancouver to unload the balance. After discharging a portion, some difficulty arose as to payment of freight, and the captain refused to wholly unload until the freight was paid. The consignees refusing to pay freight on the damaged portion of the cargo, the captain finished discharging at an independent warehouse to his own order.

The trial took place before Mr. Justice Martin, the Local Judge for the British Columbia Admiralty District, at Victoria, B. C., on the 21st and 22nd April, and was continued at Vancouver, B. C., on 1st and 2nd May, 1911.

E. V. Bodwell, K.C., and J. H. Lawson for plaintiffs; *J. A. Russell* and *H. M. Robinson* for ship.

1911

PARRATT & CO. v. THE SHIP NOTRE DAME D'ARVOR.

Argument of Counsel.

Mr. Bodwell, as to damages for demurrage cites:—*Hick* v. *Raymond* (1); *Carlton S. Co.* v. *Castle Mail Co.* (2); *Maclay* v. *Bakers* (3); *Smith* v. *Rosario* (4); *Wright* v. *New Zealand Co* (5);

As to damages for wrongful arrest:—*The Strathnaver* (6); *Xenos* v. *Aldersley* (7); *The Collingrove* (8); *Wilson* v. *The Queen* (9); *The W. D. Wallet* (10);

Mr. Russell cites : The *Stettin* (11).

MARTIN, L. J. now (July 13th, 1911,) delivered judgment.

With respect to the opening objection that the plaintiffs have no status to maintain this action, it is sufficient to say that this is an action for breach of a charter party wherein the plaintiffs Hind, Rolfe & Co., are charterers, and the fact that before action they, on January 16, 1910, sold the full cargo of cement to Balfour, Guthrie & Co., would not deprive them of their right to enforce the due performance of the charter party. Moreover I am of the opinion that Hind, Rolfe & Co., have still an interest in the cargo because the sale of it as a "full cargo" was subject to the condition that the "buyers are only bound to accept cement delivered in good merchantable condition." Such being the case the charterers have a very substantial interest in this litigation respecting the cargo since a dispute arose out of that provision. As regards the plaintiffs Parratt & Co., they jointly with Hind, Rolfe & Co., are in possession of the bills of lading duly endorsed by the shippers and are also parties to the general average bond of the 31st of August, 1910, given by them to the owners of the ship

(1) [1893] A. C., 22.
(2) [1898] A. C. at 491.
(3) 16 T. L. R., 401.
(4) [1894] 1 Q. B., 174.
(5) 4 Ex. D., 165.
(6) 1 A. C., 58.
(7) 12 Moore P. C., 352.
(8) 10 P. D., at 161.
(9) L. R. 1 P.C., at 410.
(10) [1893] P. D., 206.
(11) [1889] 14 P.D. 142.

1911

PARRATT & CO. v. THE SHIP NOTRE DAME D'ARVOR.

Reasons for Judgment.

wherein they are shown to be owners or shippers of the cargo, Balfour, Guthrie & Co., being stated to be the consignees, therefore the owners of the ship cannot now be heard to say that Parratt & Co., have no interest in the subject-matter, and, consequently, no status in this court. But if it should be necessary to do so I should not hesitate, in the circumstances, to add Balfour, Guthrie & Co.. as party plaintiffs under the wide powers given me by rule 29.

I turn then to the main question in dispute, the determination of which has been far from easy and has occupied much time. It is not necessary to refer to what happened in Victoria, where 6,029 barrels of cement were discharged, other than to say that the actions of R. V. Winch & Co., Ltd. and of Balfour, Guthrie & Co., from whom Winch & Co., had bought the cargo, in regard to the bills of lading and general average bond were so unbusiness like and irregular that Captain Picard was fully justified in forming the opinion that he would have to be careful in dealing with them in future and stand upon his strict legal rights which he had waived in a very accommodating manner in Victoria, relying upon the letters of Balfour, Guthrie & Co., of the 1st and 6th of September and telegram of the 8th, which, in view of the evidence of Greer and Barnaby, must be given full effect to and cannot be explained away. The further unjustifiable refusal or neglect to give the captain receipts for the cargo as discharged and the taking away, even temporarily, of receipts that had been given, naturally had the effect of straining the situation, and rendering him the more subject to suspicion. I make this observation because this case turns very largely upon the estimate that is to be placed upon Captain Picard's credibility, capacity and integrity and I am glad to

1911

PARRATT & CO. v. THE SHIP NOTRE DAME D'ARVOR.

Reasons for Judgment.

be able to say, after scrutinizing his conduct very carefully in the light of the evidence and exhibits—all of which I have re-read since the trial—that I have formed a favourable opinion of him and do not hesitate to place reliance upon his testimony. It is due to him to say this as his conduct was at one time severely criticized by the plaintiffs. Winch & Co., indeed, according to their letter of the 29th September, 1910, thought so highly of him that, as they say, "out of a true gratitude for the services rendered to them" they sent him what they euphemistically call "a small gratuity" in the shape of a cheque for $25.00 "acc-according to our usual custom." In the circumstance of the case, in view of the dispute between themselves and the ship, such a proceeding was peculiarly improper partaking of the nature of a bribe, and the captain correctly interpreted it as such and returned the cheque. I trust his good example will be followed by all other ships' officers who may be approached in a similar manner, and also that I shall hear no more in this court of such a pernicious custom.

No question was raised in Victoria about not paying the freight on damaged cement but some days after he had arrived in Vancouver alongside Winch's wharf on Monday, the 12th of September, 1910, and after he had discharged 5,000 barrels, Winch & Co., refused to pay freight except on barrels of cement that was in good condition and would only accept such barrels. This was clearly an improper stand to take because according to the charter party the captain was entitled to be paid his freight when it was "in slings alongside" and this unjustifiable contention is what led to all the difficulty and delay. This state of affairs continued from the 15th to the 20th of September, inclusive, during which time Winch & Co., and Balfour,

Guthrie & Co., on behalf of Hind, Rolfe & Co., were negotiating to settle the dispute between them on this point, though the captain notified them by letters, on the 16th and 17th September, of the embarrassing position he was placed in by the stoppage of the discharge owing to their disputes.

It was contended that the captain should have got the cargo out of his ship as soon as possible and thereby save demurrage, and consequently that when the dispute and its consequences became apparent he should have unloaded under his lien. But this raises a question of what is reasonable under the circumstances, and to unload under a lien is a serious step to take. He would naturally be expecting that the groundless contention which was causing all the difficulty would be withdrawn at any moment, and the whole chain of unusual circumstances had placed him in such a position of embarrassment that I am unable to say he acted unreasonably.

With regard to subsequent occurrences I content myself with saying briefly that I am unable to hold, if I accept the captain's statements as correct, which I do, that he acted in other than a reasonable and proper manner, and I am satisfied that he is not answerable for any delay and that the ship is entitled to demurrage beginning on the 11th of October. The cargo I am satisfied was duly discharged according to the charter-party, averaging over 220 tons per weather working day, the charter party calling for only an "average rate of not less than 150 tons". The tackle was sufficient to discharge within the lay days if there had been no interference.

The matters in which the captain was in error were two, viz. (1) his original demand in Victoria of $500 too much freight, which he later admitted was

1911

PARRATT & Co. v. THE SHIP NOTRE DAME D'ARVOR.

Reasons for Judgment.

an error on his part (unless his contention as to the weight of the barrels were correct); but this had no material consequences; and (2) his contention that the weight of the barrels should be taken at 400 lbs., though that weight was in conflict with the figures given in the bills of lading, and therefore, as the witness Thompson states, if he did not accept the weight in the bills of lading he should have weighed the whole cargo; the weights fixed by the custom-house could not be taken as a guide, nor in any event would his estimate based on the weighing of twenty barrels be satisfactory.

With respect to the alternative contention that in any event the ship is liable for the damaged cargo, it is sufficient to say that upon the evidence I think this is answered by the exceptions in the charter-party.

On the whole case, therefore, there should be judgment for the defendant ship upon the claim ,and upon the counterclaim which will be refered to the Registrar, assisted by merchants, if necessary, for assessment of damages, with the direction, however, that there being no gross negligence or bad faith herein no damages will be recovered for the arrest of the ship.

Judgment accordingly

Solicitors for Plaintiffs: *Bodwell & Lawson.*

Solicitors for ship: *Russell, Russell & Hannington.*