THE JOSEPH A. LIKELY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

A. W. DUCKETT AND COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

1916
*May 15.
*June 19.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION.

Shipping—Chartered ship—Suitability for cargo—Duty of owner—Dead freight—Demurrage.

L. chartered the ship "Helen" to carry a full and complete cargo of re-sawn yellow pine lumber from a port in Florida to St. John, N.B. At the port of loading the lumber of dimensions customary in the trade at that port, was furnished in quantity sufficient to fill a ship of the "Helen's" tonnage, but it could not all be stowed in that ship, which was built for the fruit trade, and could not take a full cargo of lumber of that size. The quantity loaded was delivered at St. John, and the shipowner brought action for the freight on the deficiency.

Held, reversing the judgment appealed against (44 N.B. Rep. 12), that it was the duty of the owners to provide a ship capable of carrying the cargo called for by the charter party; that the evidence established that the "Helen" was not so capable; that the charterer, having furnished lumber of the dimensions customary at the port for loading ships of the size of the "Helen," had discharged his duty under the contract, and was not liable to the owner for the dead freight.

Under the demurrage clause of the charter party, the owners claimed damages for delay in loading and discharging the cargo.

Held, that the manner in which the ship was constructed prevented the work of loading and discharging the lumber from proceeding as fast as it otherwise would have done; the delay was, therefore, imputable to the owners themselves and the charterer was not liable.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

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APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick(1), reversing the judgment at the trial in favour of the defendant.

The material facts of the case are stated in the above head-note.

Powell K.C. and *F. R. Taylor K.C.* for the appellants. The charterers tendered a full and complete cargo of the goods contracted. See *Steamship Isis Co.* v. *Bahr & Co.*(2); *Furness* v. *Charles Tennant, Sons & Co.*(3). He is not bound to offer a cargo suitable for the particular ship. *Stanton* v. *Richardson*(4).

As to the claim for demurrage, see *Postlethwaite* v. *Freeland*(5).

Teed K.C. for the respondents. The appellants have not fulfilled their contract to furnish a full and complete cargo. If they wanted long lengths of lumber carried, they should have ascertained the ship's capacity. See *Carnegie* v. *Conner*(6); *Mackill* v. *Wright Bros.*(7).

As to demurrage, Scrutton on Charter Parties (7 ed.) at pages 283 *et seq.*

THE CHIEF JUSTICE.—I am of opinion that this appeal should be allowed. The notes of my brother judges, both here and below, are so complete that anything I add must be mere surplusage. In my view, the case lies within a very narrow compass. The respondent's undertaking, in the terms of the charter-party, was to furnish a vessel "*in every way fitted*" to

(1) 44 N.B. Rep. 12.
(2) [1899] 2 Q.B. 364; [1900] A.C. 340.
(3) 66 L.T. 635.
(4) L.R. 7 C.P. 421, at p. 430; 9 C.P. 390.
(5) 5 App. Cas. 599.
(6) 24 Q.B.D. 45.
(7) 14 App. Cas. 106.

receive on board and carry from Apalachicola, Florida, to St. John, N.B., a full and complete cargo, both under and upon deck, of re-sawn yellow pine lumber. And the obligation of the appellants, the shippers, was to deliver an average cargo of the kind described alongside and within reach of the vessel's tackle. A cargo of re-sawn yellow pine lumber of the average lengths and sizes was delivered as provided for, but was not received on board the vessel because of its peculiar construction. It is not disputed that the cargo furnished the "Helen" was, as to sizes and dimensions, the same as had been furnished under similar charters for years at Apalachicola. In their factum the respondents admit that the ship and cargo were not suited to each other. The vessel was fitted out for the fruit trade, and not at all adapted, in accordance with the terms of the charterparty, to receive the lumber which the appellants chartered her to carry. I fail to understand how it can be assumed that the onus was upon the appellants to ascertain whether the ship which the respondents chartered to them to receive a full and complete cargo of lumber, was adapted to carry such a cargo. The special construction and equipment of the vessel was a fact within the peculiar knowledge of the respondents, who must also be assumed to know, when they made the charterparty, what was meant by the term "a cargo of re-sawn yellow pine lumber." At the time the charterparty was entered into, the vessel lay in New York Harbour, and the appellants never saw her until she arrived in St. John. In any event, the respondents' contract was to provide a vessel fitted for the cargo and to receive on board the merchandize mentioned in the charterparty, and this they failed to do, and they must suffer for the consequences.

The appeal should be allowed with costs.

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DAVIES J.—The controversy in this appeal is as to the respective obligations of the owner and charterer of a ship chartered by the appellants to carry

a full and complete cargo both under and upon deck of re-sawn yellow pine lumber

from Apalachicola, Florida, to St. John, N.B.

The action was brought by the owners against the charterers to recover damages by way of demurrage or detention and also for dead freight.

The contention of the plaintiff owner was that the charterer was obliged to furnish the steamer with such lengths of lumber as she could well stow and carry to her full capacity, and that, as no special lengths of the "re-sawn yellow pine lumber" were mentioned, the charterer was bound to furnish such lengths only as the steamer could carry, and, not having done so, but having offered timber of lengths the steamer could not carry, was liable for the damages for the dead freight, and that the trade usage did not apply or control.

The defendant's contention, on the other hand, was that he was only bound to provide the lumber stipulated for of the ordinary lengths and dimensions in that trade, and that the accepted trade meaning of the term "re-sawn yellow pine lumber" is such lumber, sawn on four sides, without reference to lengths or dimensions, and that the lumber he furnished was such as was well known to and in the trade as re-sawn yellow pine lumber, sawn on four sides, and practically the same as that furnished by his company under similar charters for many years. There was much difference of judicial opinion in the courts below. The learned trial judge held:—

In view of all this evidence, I think it is abundantly clear that the cargo furnished to the "Helen" at the loading port was quite in accordance with the charter party and the claim for dead freight cannot be

allowed. I find as a fact that the ship "Helen" was unsuitable for the carriage of the freight the plaintiff company engaged to carry, and that defendant company fulfilled its obligation by furnishing a full and complete cargo of re-sawn yellow pine lumber to the plaintiff company's ship "Helen" at the loading port.

As to the detention, it is to be noted that, so far as such claim concerns the port of loading, it rests wholly on the contention that time was lost because the cargo furnished was of unsuitable dimensions.

He further found:—

It is unnecessary for me to recapitulate the evidence of this witness in his description of the particulars, in which he says that "Helen's" construction and equipment delayed the discharge. His testimony convinces me that the delay was due to the ship itself, and not to the presence of the schooner complained of and certainly not to the defendant. The evidence of every witness who speaks of the build and equipment of the steamer,—even that of Mr. Duckett himself—confirms me in the conclusion above expressed.

On appeal to the Supreme Court of New Brunswick, Chief Justice McLeod was of the opinion that the defendant company was obliged to fill the steamer to her full carrying capacity and to furnish such lengths of "re-sawn yellow pine lumber as she could carry." Not having done so, he held the defendant liable for the dead freight and for the demurrage at Apalachicola arising out of the fact that the steamer was unable to stow 150,000 feet per day owing to the long lengths of lumber supplied. For the same reasons he held defendants liable for the seven days' demurrage at St. John in unloading. Grimmell J. concurred with the Chief Justice, while Barry J., in a lengthy, reasoned judgment, in which he cites and discusses most of the authorities bearing upon the dispute, agreed with the trial judge.

As a fact it seems clear from the evidence and the argument at bar that, while the cargo tendered to the ship was an ordinary cargo of re-sawn yellow pine lumber mentioned in the charterparty, the steamer could not be called an ordinary steamer of her tonnage. On

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the contrary, she was of a special and unusual build and construction and fitted to meet the requirements of a special trade, the West India fruit trade.

I cannot find any answer, in view of the evidence given of the usage in the yellow pine lumber trade, to the proposition stated by Barry J. that:—

> If the cargo tendered was (as found) an ordinary one and the ship was an unusual and abnormal one, it would be consonant to both sense and reason to say that any loss which may have been occasioned by reason of the unsuitableness of the cargo for the ship or the ship for the cargo ought to be borne by the shipowners, and that the rights and obligations of the parties must be determined by the written contract, the construction of which is for the court without regard to any consideration as to the knowledge of either party with respect to the character of the ship or cargo.

The legal proposition which he deduces from the authorities and on which he based his conclusions was that a shipowner, by entering into a charterparty, impliedy undertakes that the ship shall be reasonably fit for the carriage of a reasonable cargo of the kind stipulated for in the charter, and that the reasonable cargo to be supplied must be of the kind specified in the charter.

The case of *Stanton* v. *Richardson*(1), in 1872, affirmed in the Exchequer Chamber(2) in 1874, and in the House of Lords(3), in 1875, fully sustains this proposition formulated by Barry J. Mr. Justice Brett says, at page 435 of the report in the Common Pleas:—

> I think the obligation of the shipowner is to supply a ship reasonably fit to carry the cargo stipulated for in the charter party,

citing as authorities, *Lyon* v. *Mells*(4); *Gibson* v.

(1) L.R. 7 C.P. 421.
(2) L.R. 9 C.P. 390.
(3) 45 L.J.Q.B. 78.
(4) 5 East 427.

Small(1); *Havelock* v. *Geddes*(2). And see Blackburn J. in *Readhead* v. *Midland Railway Co.*(3).

Applying this principle, Barry J. held that the findings of fact of the trial judge shewed the cargo tendered at Apalachicola to have been an ordinary and reasonable cargo of re-sawn yellow pine lumber as called for by the charter; that the steamer was not a reasonable ship for the cargo offered; and that he could not say the evidence was insufficient to support the finding that the delay in discharging the vessel in St. John was not occasioned by the fault of the charterers, but was wholly attributable to the unusual construction and equipment of the ship.

After hearing all that could be said in support of the judgment appealed from, and after reading and carefully considering the charterparty and the different parts of the evidence called to our attention by Mr. Teed, I have reached the conclusion that the proposition of law on which the Chief Justice and Grimmell J. based their conclusions, namely, that it was incumbent on the defendant company to furnish the steamer with such lengths of lumber as she could stow and carry, and that, having furnished lumber of lengths which prevented the steamer stowing or discharging 150,000 feet per running day, they were liable as well for the dead freight as for the demurrage alike in Apalachicola as in St. John, cannot be supported. On the contrary, I am of the opinion that the judgment of Mr. Justice Barry, founded upon the findings of the trial judge, is substantially right and is supported by the highest authorities.

The question whether the re-sawn yellow pine lum-

(1) 4 H.L. Cas. 353. (2) 10 East 555.
(3) L.R. 2 Q.B. 412.

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ber offered the ship was of reasonable length was one of fact. The evidence shewed that it was of the customary and usual lengths of that kind of timber shipped in the trade at Apalachicola. That being so, I hold, as the trial judge found, that it was a reasonable cargo to be carried under the charterparty; that the obligation of the charterer had been discharged when he offered it; and that the inability of the steamer to carry such lengths of timber owing to her peculiar construction was a failure on the part of the shipowner to furnish a suitable vessel to carry that cargo, or, as put by the Lord Chancellor, in the case of *Stanton* v. *Richardson*(1),

> to provide a ship which is reasonably suited to carry that particular cargo.

I would, therefore, allow the appeal and restore the judgment of the trial judge, with costs in all the courts.

IDINGTON J.—I agree with the construction put by the learned trial judge and Mr. Justice Barry, in the Court of Appeal, upon the charterparty in question herein.

I assume, as they seem to do, that a shipowner, tendering a vessel for a specified service, must supply one reasonably fit for the purpose of being loaded with the freight specified in general terms, as in the charter party.

They have dealt so fully with the evidence and legal authorities applicable thereto that I cannot add anything useful, for I agree in the general line of reasoning they have adopted in relation thereto, so far as the claim set up for loss of freight and loss by delay in loading is concerned.

(1) 45 L.J.Q.B. 78.

If there had been evidence that any substantial part of the freight tendered was of such lengths that men of experience and judgment should say that it was unreasonable to expect it to be shipped on "a vessel of 635 tons net register," specified to be that of the "Helen," the vessel in question, there might be room for Mr. Teed's argument being given effect to.

He has had to contend for that without evidence to support it, and, indeed, is hence driven to urge, what I think is not founded in law, that the charterer takes the risk beyond even that, and must be held to know of the fitness or unfitness of the vessel he charters for the service he contracts for. I cannot assent to such a proposition.

The unfitness of the vessel for the service for which her brokers and in effect owners for the time being tendered her, seems to have been the cause of the loss of time in loading and unloading.

In regard to the loss of time unloading, I wish to guard against committing myself to the proposition that, in the case of such a charterparty as before us, the rules governing the harbour master or his hard necessities must bind the parties concerned.

The learned trial judge seems to me to have set that aside for the purpose of this case, and attributed the loss to other causes. In doing so, I cannot find he conflicted with the evidence.

I think the appeal should be allowed with costs.

ANGLIN J.—Upon the evidence I am satisfied that the cargo tendered by the defendant was reasonable and such as a vessel chartered for the purpose of carrying a cargo of "re-sawn yellow pine lumber" from Apalachicola should be able to load to her full capacity. That the plaintiffs' vessel was unable to do so was, I

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think, due to her peculiar construction and the fact that she had been outfitted for fruit carriage, rendering her unsuitable for the business for which she was chartered to the defendant, and thus involving a breach of the plaintiffs' obligation under the charter. The incapacity of the steamer was the cause of the loss of dead freight of which the plaintiffs complain, and also of the demurrage at the port of loading. I agree with the learned trial judge that the evidence would not warrant a recovery by the plaintiffs for the seven days' demurrage at the port of St. John for which they claim. Apparently there was also a delay at St. John of one-half a day, for which the respondents might perhaps be liable, occasioning damage amounting to $50. On the other hand, had he counterclaimed, the defendant would probably be entitled to a larger sum as damages for failure of the plaintiffs' ship to take the full cargo provided for her.

On the whole, I agree in the conclusions reached by the learned trial judge and by Barry J., who dissented in the Appeal Division, and would allow this appeal with costs and restore the judgment dismissing the action with costs.

BRODEUR J. agrees with Mr. Justice ANGLIN.

Appeal allowed with costs.

Solicitor for the appellant: *Fred. R. Taylor.*

Solicitor for the respondents: *M. G. Teed.*