NOVA SCOTIA ADMIRALTY DISTRICT

1937
Nov. 9.
1938
Jan. 28.

BETWEEN:

WESTERN NOVA SCOTIA BAIT FREEZERS LIMITED ..... PLAINTIFF;

AND

THE SHIP SHAMROCK ..... DEFENDANT.

Shipping — Foreign vessel — Necessaries — Charter-party — Authority of master—Liability of owner—Vessel sailed under the "quarter lay" or sharing system.

The action was brought by the plaintiff against a foreign vessel for necessaries supplied on her account at a Canadian port. The vessel was engaged in the fishing business and at the time the necessaries were supplied she was operated on what is known as the "quarter lay." The owners appointed the Master who hired the crew and after certain deductions from the gross proceeds of a voyage the balance was distributed between the owners, the master and the crew. The plaintiff supplied bait and ice to the ship on the order of the master and the credit of the ship and owners.

Held: That considering the nature of the business defendant ship was engaged in, the bait and ice were necessaries.

2. That upon the true inference to be drawn from the facts as proved, there was no demise or bailment of the ship to the master; that he managed and sailed the ship for the joint benefit of himself and the owners whose servant or agent he was, and that the ship was liable for the amount claimed.

ACTION *in rem* by plaintiff to recover from defendant ship the value of necessaries supplied to it at a Canadian port.

The action was tried before the Honourable Mr. Justice Carroll D.J.A., Nova Scotia Admiralty District, at Halifax.

W. C. MacDonald, K.C. and *D. J. Fraser* for plaintiff.

F. D. Smith, K.C. and *C. R. Coughlan* for defendant.

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

CARROLL D.J.A., now (January 28, 1938) delivered the following judgment:—

This is an action against the American ship *Shamrock* for the price of ice and bait supplied on board said ship at the request of the Captain while ship and captain were in a Nova Scotia port. The supplies were delivered about the 1st of May, 1936. The ship was seized to respond to this claim. Evidence was taken at Boston by virtue of a commission granted.

The *Shamrock* is a vessel of American registry and was engaged in the fishing business. She was operated on what is known as the "quarter lay." The owners appointed the captain, who, I think, hires his own crew. The proceeds of a voyage were distributed between the owners, master and crew. There is deducted after a voyage, from the gross proceeds, wharfage and scaleage at the pier, oil, $10 for engineer, $3 per night for watchman, something extra for the cook, and one-half of one per cent for the Boston Fish Exchange. As to the cost of ice there is some contradiction in the evidence but I think it is not deducted from the gross proceeds. One-quarter of the balance was taken by the owners. The remaining three-quarters went to the captain, out of which he paid most of the expenses of the voyage except fuel, which is supplied by the owners. The vessel is completely outfitted, so far as fishing gear is concerned, by the owners. The crew are paid on "shares" from this three-quarters. The owners are responsible for repairing of sails and such like and have control of that, but for fishing tackle, such as trawls lost or broken, the captain and crew are responsible. In addition to this share of the three-quarters the captain or master receives five per cent of the gross.

There are two defences set up to the action, the first that the goods supplied were not "necessaries" within the meaning of that word as interpreted by Courts of Admiralty, and in any event there is no proof that the bait and ice were necessary at the time of delivery. This vessel was engaged in the fishing business and it is shown by the evidence that ice and bait are essential for the

prosecution of that industry as carried on by the *Shamrock*. I think, too, that without any evidence of the situation here one having knowledge of the business in which this vessel was engaged is bound to reach the conclusion that bait and ice were necessary for the proper prosecution of that business because "necessaries" has been judicially interpreted as "whatever is fit and proper for the service in which the vessel is engaged; whatever the owner of that vessel as a prudent man would order if present at the time": Abbott C.J., in *Webster* v. *Seekamp* (1).

Then, too, the evidence of Captain Wilson of the *Shamrock* indicates, in fact the only reasonable inference to be made from it, is that the ice was necessary at the time it was placed aboard, necessary for that voyage or "immediately necessary."

Speaking to the time the purchase was made he was asked the question: "They had to have bait, didn't they?" And he answered "Yes."

The most serious defence offered however is that the *Shamrock* was under charter, and such a charter as amounted to a demise of the ship; that the owner had parted with possession of her, and exercised or could exercise absolutely no control over the ship or captain. I am not just clear whether the contention is that she was chartered to the captain alone or to the captain and crew.

Many authorities were cited to me on the argument, and I have read many additional ones dealing with this question.

It was decided in *Frazer* v. *March* (2) that a registered owner divests himself by a charter-party of all *control* and possession of a vessel for the time being in favour of another who has *all the use and benefit of it* is not liable for stores furnished to the vessel by order of the captain while such charter-party is effective. In this case the owner could not appoint a captain, and did not appoint him and the relationship between the owner and captain was not that of servant or agent. Practically the same proposition was held sound by the House of Lords in *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (3),

(1) (1821) 4 B. & E. Ald. 352; 106 E.R. 966.
(2) (1811) 13 East 238; 104 E.R. 362.
(3) (1893) A.C. 8.

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which was an action for the price of goods by the shipper against the owner. The vessel was under charter and the charterers appointed the captain and crew, and the owners divested themselves *of all control* and possession of the vessel. It was held that the captain was not the agent of the owners and could not bind them by contract without express authority. The Court also held that the fact that the shippers had no notice of the charter-party made no difference. In our Courts we have the case of *The Barge David Wallace* v. *Bain* (1) which is authority for what it decides on the subject. Then there are the cases cited which dealt with compensation to members of the crew of ships injured or killed while engaged in their occupations aboard ship. The chief is *Boon* v. *Quance* (2) and also *Jones* v. *Owners of the Ship Alice & Eliza* in the same volume of Butterworth at page 495, which seem to extend the principle enunciated in the above two cases. I shall refer to such cases as I proceed. There of course may be cases where the vessel is under charter without actual demise of the ship—where the owner retains some measure of control over her—and the owners and ship are responsible for necessaries supplied (3). In this case Lushington J. said at p. 276:—

> For *prima facie* the master is the agent of the owner . . . . I cannot think it is consistent with justice, or according to ordinary mercantile practice, that a shipper of goods on board a ship . . . . should lose his right to sue the owner for damage, on account of a charter of this description.

The same principle was adopted in *Sandeman* v. *Seurr* (4) and in *Manchester Trust* v. *Furness* (5). In the last mentioned case the Court after discussing and distinguishing the case of *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (*supra*) and *Colvin* v. *Newberry* (6), indicated that if there is any reservation that the ship is not given up entirely, then the owners are liable.

There is further the authority of *Associated Portland Cement Manufacturers Ltd.* v. *Ashton* (7) where it was held that upon the true inference to be drawn from the facts as proved there was no demise of the ship to the

(1) (1903) 8 Ex. C.R. 205.
(2) (1909) 3 Butterworth's Comp. Cas. 106; 102 L.T.R. 443.
(3) *The St. Cloud* (1863) 167 E.R. 269.
(4) (1866) L.R. 2 Q.B. 86.
(5) (1895) 2 Q.B.D. 539.
(6) (1832) 1 Cl. & Fin. 283. (1832) 6 E.R. 923.
(7) (1915) 2 K.B.D. 1.

master. The barge was being worked on the system of "thirds" under which the master took two-thirds of the gross freights paying thereout the mate, crew, cost of provisions and expenses of the voyage and handing over one-third of the gross freights, less harbour and towage dues, to the owner. At page 18 the Court adopted the reasoning in *Steel* v. *Lester* (1) and quoted with approval the language of Lindley J. in that case:—

> What is the true substance and result of that arrangement? We are asked to say that it amounted and was equivalent to a demise of the ship by the owner to the master, throwing the whole responsibility of the management on the master and taking it off the shoulders of the owner. I do not think such an arrangement amounted to a demise or anything of the kind. I look on it either as a mere mode of paying Lilee (the master) for his services—the owner paying him a share of profits instead of fixed wages and retaining control over the master, but leaving the master to choose his ports and men.

In the *Portland Cement* case (*supra*) some of the United States decisions and authorities cited to me were cited to that Court but in the reports that I have read of the case no notice was taken of them. It is in this case, too, that cases under the Workmen's Compensation Act were discussed. On this question Lord Cozens-Hardy M.R. said at p. 11:—

> Moreover, the question under the Workmen's Compensation Act is whether the relationship of master and servant exists, and an answer to that question in the negative would be in no way decisive upon the question whether the owner of a vessel is answerable for the contracts made by the master. As was pointed out in *Steel* v. *Lester*, the question is whether the master was agent of the owner for the management of the vessel. Cases under the Workmen's Compensation Act are of little assistance.

The Tolla (2) was cited as an authority but I am not founding my opinion on the judgment in that case.

Here it seems to me to be a question of fact whether the owners had to a certain extent the direction of the master—whether they retained some measure of control—whether the master could use the vessel as and how he liked. See *The Great Eastern* (3). If there were some measure of control, there is no demise of the ship.

I take it to be a joint venture where the owners say: "You go as master of this vessel on a particular venture and hire your men and take a certain proportion of the catch as your pay." There is no doubt the master could

(1) (1877) 3 C.P.D. 121. (2) (1921) P. 22.
(3) (1868) 2 Adm. & Ecc. 88.

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have been dismissed at any time—he was dismissed after four or five years' service. He was told he could sell the catch elsewhere if O'Hara's had a full supply.

The master said he did not hire the boat and while the evidence of the master is more or less contradictory on the matter there is no doubt in my mind he had some responsibility to the owners, shore captain or manager. The owners notified people in Nova Scotia to give the boat nothing—they paid a previous account of the claimants.

The claimants will therefore have judgment for the amount claimed with costs.

Judgment accordingly.