1906

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TORONTO ADMIRALTY DISTRICT.

THE UPSON WALTON COMPANY.....PLAINTIFFS;

AGAINST

THE SHIPS *BRIAN BORU*, *SHAUGHRAUN*, *MONROE DOCTRINE*, AND *RECIPROCITY*.

Shipping—Maritime lien—Charter-party—Right to pledge credit of ship.

The orders of a foreman of the charterers, not being the captain of the vessel, cannot create a maritime lien against such vessel.

Where a ship is chartered and supplies are furnished to the charterer with a knowledge of his position with regard to the ship, no maritime lien attaches to the ship.

ACTION for supplies furnished to the above named ships.

The cause was tried at the Town of Sandwich on the 26th day of January, 1906, judgment being reserved.

The facts of the case are cited in the reasons for judgment.

E. S. Wigle for the plaintiffs;

F. A. Hough for the defendants.

HODGINS, L. J., now (February 24th, 1906), delivered judgment.

The plaintiff company claims to be allowed the value of certain supplies to the ships mentioned in the statement of claim, alleging that "the said supplies were furnished to the said ships at the request and by the direction of the Donnelly Construction Company at the Port of Cleveland, Ohio, United States of America, which company was in charge and full control of the said ships at the time; and said supplies were furnished upon the credit of the said ships, and not merely on the per-

sonal credit of the said company, and the said supplies were for the necessary use of said ships."

The owners of the said ships have intervened and have filed a statement of defence alleging that when the said supplies were furnished, "the said ships were owned by the Dunbar and Sullivan Dredging Company but were under charter to, operated by, in charge and full control of the Donnelly Construction Company to the knowledge of the plaintiffs, and if such supplies were furnished at the request of, and by the direction of the Donnelly Construction Company, as alleged in the said claim, such supplies were so furnished solely upon the personal credit of the said Donnelly Construction Company."

By a charter-party bearing date the 10th March, 1904, reciting that the ships (except one, the *Paddy Miles*) were then in the possession of the Donnelly Contracting (not the Donnelly Construction Company as the pleading of both parties allege)—under a former lease, then expired, the Dunbar Company leased to the Donnelly Company the said ships, and the said Donnelly Company agreed to hire the same at a fixed rental for a specified term. And the charter-party then provided that "during the life of this agreement the Donnelly Company promises to immediately replace parts when broken, and make repairs and do all things necessary to maintain the property in a condition equal to that in which it was actually received by the Donnelly Company." This clause brings the case within *Anglin* v. *Henderson* (1).

A further clause provided that "the Donnelly Company agrees to pay promptly all bills for towing, supplies, wages, dry docking and repairs whatsoever, incidental to the use and maintenance of the property hereby leased, and to do all things necessary to protect this property or any part of it from liens or incumbrances."

(1) 21 U. C. Q. B. 27.

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The evidence shows that the supplies were furnished to the ships on the order of the foreman of the Donnelly Company; and there is no evidence to show that this foreman was master of any of the ships or in any service or employment which would constitute him the master and agent, or representative of the Dunbar Company, so as to render them or their ships liable for the supplies furnished; and the plaintiffs statement of claim effectually negatives any agency by alleging that "the said supplies were furnished to the said ships at the request and by the direction of the Donnelly Construction Company." The ships appear to have been used by that company in the construction of a breakwater in Cleveland Harbour, Ohio, U.S., and the order for the supplies seems to have been given by the company's foreman of the construction works.

The master of a ship (and in some cases a ship's husband) is the legally recognized agent of the owner, and as such has implied authority to render their ship liable for supplies and subject it to a maritime lien for such supplies. And the tendency of the cases in England is to hold the person furnishing supplies to a ship at the request of a master to strict proof of his agency; *Mitcheson* v. *Oliver* (1). The ordering of supplies by a master on the credit of a ship is however sufficient *primâ facie* proof that such supplies were necessary. The *Grapeshot* (2).

The orders of the company's foreman for ships' supplies cannot give the plaintiffs a maritime lien on the defendant's ships.

But another point was argued which it may be proper to consider. As before stated the defendant's vessels were under a charter-party to the Donnelly Company, and it appears from the accounts put in that the supplies ordered by the company's foreman were charged against

(1) 5 E. & B. 419; 1 Jur. N.S. 900. (2) 9 Wall. 129.

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the ships; and the plaintiffs contend that being so charged they have a maritime lien on the defendant's ships.

The decisions of the Admiralty Courts of the United States respecting liabilities of ships under charter-party are not in complete accord with the decisions of the Admiralty Courts in England, and especially a late decision of the House of Lords. The result of their decisions seems to be that where the owner allows the charterer to have the control, management, and possession of the vessel, and thus become the owner, *pro hâc vice*, for the voyage, the owner must be deemed to consent that the vessel shall be answerable for the necessary supplies furnished and repairs made in a foreign port. The *Freeman* (1). And in some of the earlier cases their Admiralty Courts have held that the chartered vessel is liable even although the person furnishing the supplies knew of the charter-party, and that by its terms the charterer was bound to furnish such supplies for the voyage. The *City of New York* (2).

But their Supreme Court, in the *Lulu* (3) appears to have differed with this latter case as to the effect of notice of the charter-party. And in disposing of that case the court held that the fact that repairs and supplies were necessaries would not be sufficient to entitle the furnisher to recover by a suit *in rem* against the vessel, if it appeared that facts and circumstances were known to him sufficient to put him on inquiry, and to show that if he had used due diligence he would have ascertained such facts and circumstances.

It is well settled law that a party to a transaction when his rights are liable to be injuriously affected by notice, cannot wilfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice

(1) 18 How. 182.

(2) 3 Blatch. 187.

(3) 10 Wall. 192.

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if it had been actually received; or, in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence, he would have ascertained the truth of the case, is equivalent to the actual notice of the matter in respect of which the inquiry ought to have been made.

In *Newberry* v. *Colvin* (1) Tindal, C.J., in delivering the judgment of the court, recognized the effect of notice to the shippers that the ship on which they had shipped the goods was under a charter-party, and he intimated that the finding of the jury that the charter-party was known to the shippers "negatived" any inference that would otherwise have arisen that the master by reason of his command of the vessel, was held out by the defendants (owners) as their agent in the conduct and management of the ship, as the shippers knew the real situation and relative rights of the captain and the owners, before they put their goods on board to be carried on that voyage. This was affirmed in the House of Lords. See *post.*

In *Sandeman* v. *Scurr* (2), where there had not been a demise of the ship, the above case was approved, but Sir A. Cockburn, C.J. said "Our judgment proceeds on the ground wholly irrespective of the charterer's liability, and not inconsistent with it, namely, that the plaintiffs having delivered their goods to be carried in ignorance of the vessel being chartered, and having dealt with the master as clothed with the ordinary authority of a master to receive goods and give bills of lading on behalf of his owners, are entitled to look to the owners as responsible for the safe carriage of the goods." And further "we think that until the fact of the master's authority has been put an end to is brought to the knowledge of the shipper of goods, the latter has a right to look to the owner

(1) 7 Bing. at p. 206. (2) L. R. 2 Q. B. 86.

as the principal with whom his contract has been made." The pleadings and evidence in this case satisfy me that the plaintiffs had knowledge that these ships were in the possession of the Donnelly Company and under a charter-party, and therefore under the case of the *Lulu* (*supra*), such knowledge is equivalent to actual notice of the terms of the charter-party.

But the case of *Baumvoll Manufactur von Scheibler* v. *Gilchrist* (1), seems to decide that the question of knowledge by the shipper of the charter-party is not now to be considered an element in determining the liability of the owner, for in that case the shipper did not know of the existence of the charter-party.

The House of Lords confirmed the judgment of the Court of Appeal that the intention and effect of the charter-party was that the owner parted with the possession and control of the vessel to the charterer, that consequently the captain was not in fact, nor could he be taken to be the servant of the owner, and that as he was not the agent of the owner the owner could not be held liable, either under the bills of lading, or for any alleged negligence of the captain.

Lord Herschell, L.C., quoting *Fraser* v. *Marsh* (2), "He (Lord Ellenborough) puts the question to be determined this: whether the captain who ordered the stores was or was not the servant of the defendant who was sued as the owner. He makes that the test of the liability, and says that if he has so divested himself of the vessel, and of its use and benefit, so that it is in the possession of another, whose servant the master is, then the owner ceases to be liable in respect of stores ordered by the master." And he adds: "What distinction is there between a case of stores and a case of liability in respect of any other matter which the master has a right to do on behalf of the owner, whoever he may be? I

(1) [1891] 2 Q. B. 310; [1892] 1 Q. B. 253; [1893] A. C. 8.

(2) 13 East 238.

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am at a loss to see any ground for the distinction. There is no authority for it and I do not see any sound basis for it."

And referring to the case of *Colvin* v. *Newberry* (1), Lord Herschell said: "It is quite true that in that case the shipper had notice of the charter, and therefore knew of the relation which existed between the ship-owner and the charterer. But I do not gather from the judgments either in the Exchequer chamber, or in your Lordship's house, that that was considered an essential part of the defendant's case. It was alluded to rather as meeting an argument which had no doubt been suggested, that the master of the vessel who was in that case the person to whom the vessel had been lent, might have been properly regarded by those who dealt with him, as acting not merely on behalf of himself, or of some owner or other, if they had not had notice that he was in fact at the time being the owner. But certainly it seems to me that it would not be correct to say that the decision in that case, either in the Exchequer chamber or in your Lordship's house, was rested solely or mainly upon the fact that such notice existed." And Lord Watson, in concurring, said, "I know of no principle or authority which requires that notice must be given when an owner parts, even temporarily, with the possession and control of his ship, in order to prevent the servant of the charterer from pledging his credit (2)." See further the *Tasmania* (3).

These authorities require me to hold that the plaintiffs' company are not entitled to the maritime lien claimed, and that this action should be dismissed with costs.

E. S. Wigle, counsel for plaintiffs.

F. A. Hough, counsel for defendants.

Judgment accordingly.

(1) 8 B. & C. 166; 7 Bing. 190; 1 Cl. & F. 283.

(2) [1893] A. C. at pp. 19, 21.

(3) 13 P. D. 110.