Privy Council Appeal No. 8 of 1920.

The Ship "Marlborough Hill" - - - - - *Appellant*

v.

Alex. Cowan and Sons, Limited, and others - - - *Respondents*

FROM

THE SUPREME COURT OF THE STATE OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER, 1920.

Present at the Hearing:

VISCOUNT CAVE.
LORD DUNEDIN.
LORD MOULTON.
LORD PHILLIMORE.

[*Delivered by* LORD PHILLIMORE.]

In the month of June, 1919, the Finnish sailing ship "Marlborough Hill" arrived at Sydney on a voyage from New York, and on the 12th June, a writ *in rem* at the instance of some twenty plaintiffs, the present respondents, was issued against the ship, in an action for non-delivery of goods under bills of lading. The writ was endorsed as follows:—

> "The plaintiffs claim as consignees and endorsees of bills of lading for non-delivery of goods agreed to be carried by the said ship 'Marlborough Hill,' and delivered to the plaintiffs respectively at Sydney, or agreed to be shipped within a reasonable time by some other vessel of the same line, and delivered to the plaintiffs respectively in Sydney, and for the loss and value of the goods undelivered as aforesaid, and the plaintiffs claim the sum of £1,515 for the loss aforesaid and for costs."

There followed particulars of the several claims, the largest being for £334, and the smallest for £3 16*s*. Affidavits were sworn separately by each of the plaintiffs on or about the 12th June. They were all in similar form and averred that in November, 1918, bills of lading were signed for on behalf of the master by

a firm of agents for the carriage of certain cargo from New York to Sydney to be delivered to the holders of the bills of lading; that the plaintiffs were endorsees of the bills of lading; that "the said goods were either lost during the said voyage or were not shipped either by the said vessel or by any other vessel within a reasonable time, and were not delivered to the plaintiff as agreed"; with further necessary formal statements to support process. Thereupon a warrant was issued to arrest the ship, and she was held to bail, and the necessary bail bond having been entered into, the ship was released. It is presumed that an appearance must have been entered on behalf of the owner of the ship, at or before the time when the bail bond was given; but the actual form of the appearance is not upon the record, and their Lordships have no information whether it was an absolute appearance or an appearance under protest. The rules in the Admiralty Jurisdiction of the Supreme Court of New South Wales make no specific provision for an appearance under protest. But by Rule 155—

> "in all cases not provided for by these rules the practice of the Court in its Common Law jurisdiction shall be followed, or in cases therein unprovided for the practice of the Admiralty Division of the High Court of Justice of England shall be followed."

And the usual mode of raising an objection to the jurisdiction in Admiralty cases is by appearing under protest.

However this may be, on the 17th June, a summons was taken out on behalf of the owner of the ship to set aside the writ and all proceedings thereupon, on the ground that the claims of the various plaintiffs in respect of which the writ had been issued were separate and distinct claims, and could not legally be joined together in one action. In support of this application, an affidavit was filed sworn by one Frank Linton. The terms of this affidavit will be discussed later. The application was heard by Owen J. in Chambers on two occasions. On the second occasion, a further point was taken on behalf of the ship owner to the effect that no such action would lie in Admiralty even if brought by each plaintiff separately, or alternatively, that some of the claims were outside the jurisdiction. The Judge allowed this further point to be raised, and then had the whole matter stated in the form of a special case for decision by the full Court. The questions submitted for the opinion of the Court were two :—

> "(1) Has the Supreme Court of New South Wales in its Admiralty jurisdiction under the circumstances set out herein any jurisdiction to hear and determine this action ?
>
> "(2) Are the plaintiffs properly joined in this action ?"

After argument the full Court ordered—

> "that the said questions of law should be answered as follows: (1) 'The Supreme Court of New South Wales in its Admiralty Jurisdiction has jurisdiction to hear and determine this action, but it is necessary in order to succeed there that each plaintiff should prove that the goods in respect of which he claims were shipped on board the 'Marlborough Hill.' (2) Yes."

It is from this decision that the ship owner has appealed to the King in Council.

An extract from the bill of lading was annexed to the special case, but their Lordships have had the full document submitted to them.

Admiralty jurisdiction is conferred upon the Supreme Court of New South Wales by the Colonial Courts of Admiralty Act of 1890, which in substance provides that the jurisdiction of a Colonial Court of Admiralty shall be over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, and that the Colonial Court may exercise such jurisdiction in the manner, and to as full an extent as the High Court in England. The Admiralty jurisdiction of the High Court in England, with a consequent right to try actions in this class either *in rem* or *in personam*, arises from Section 6 of the Admiralty Court Act, 1861, whereby it is provided that—

> "the High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales, in any ship for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shown to the satisfaction of the Court, that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales. . . ."

By a provision of the Colonial Courts of Admiralty Act, the words "domiciled in England or Wales" must mean in this case "domiciled in New South Wales," which the owner of this ship was not.

The first point taken on behalf of the appellant is that this purports to be a claim by the assignee of a bill of lading, and that the shipping instrument on which reliance is placed is not a bill of lading; and this point requires some careful consideration. The document is not in the old form of a bill of lading. The old form starts with a statement or acknowledgment that the goods have been shipped. It runs "shipped on board," etc. But this document runs "received in apparent good order and condition from . . . for shipment." The old form is precise that the goods have been shipped on board the particular vessel, though the conditions of the bill of lading may proceed afterwards to permit of transhipment. This document runs to the effect that the goods have been received for shipment by the sailing vessel called the "Marlborough Hill," or by some other vessel owned or operated by the Commonwealth and Dominion Line, Ltd., Cunard Line, Australasian Service; and the first term which is expressed to be mutually agreed is to the effect that the ship owner may substitute or tranship the whole or any portion of the goods by any other prior or subsequent vessel at the original port of shipment, or at any other place. The contract, therefore, is not one by which the shipment on the particular vessel proceeded against is admitted, nor one whereby the ship owner or his agent or the master contracts to carry and deliver by that ship. It is one whereby the agents for the master put their signature to the contract, admit the receipt for shipment and contract to carry and deliver,

primarily by the named ship, " Marlborough Hill," but with power to substitute any other vessel owned and operated by the specified line, or possibly under the first condition by any other ship whatsoever. But the contract does contain the further obligation that, subject to the excepted conditions and perils, either the named ship or the substituted ship shall duly and safely carry and deliver.

It is a matter, of commercial notoriety, and their Lordships have been furnished with several instances of it, that shipping instruments which are called bills of lading, and known in the commercial world as such, are sometimes framed in the alternative form " received for shipment " instead of " shipped on board," and further with the alternative contract to carry or procure some other vessel (possibly with some limitations as to the choice of the other vessel) to carry, instead of the original ship. It is contended, however, that such shipping instruments, whatever they may be called in commerce or by men of business, are nevertheless not bills of lading within the Bills of Lading Act of 1855, and it is said therefore not bills of lading within the meaning of the Admiralty Court Act, 1861.

Their Lordships are not disposed to take so narrow a view of a commercial document. To take the first objection first. There can be no difference in principle between the owner, master or agent acknowledging that he has received the goods on his wharf, or allotted portion of quay, or his storehouse awaiting shipment, and his acknowledging that the goods have been actually put over the ship's rail. The two forms of a bill of lading may well stand, as their Lordships understand that they stand, together. The older is still in the more appropriate language, for whole cargoes delivered and taken on board in bulk; whereas " received for shipment " is the proper phrase for the practical business-like way of treating parcels of cargo to be placed on a general ship which will be lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage.

Then as regards the obligation to carry either by the named ship or by some other vessel; it is a contract which both parties may well find it convenient to enter into and accept. The liberty to tranship is ancient and well established, and does not derogate from the nature of a bill of lading; and if the contract begin when the goods are received on the wharf, substitution does not differ in principle from transhipment.

If this document is a bill of lading, it is a negotiable instrument. Money can be advanced upon it, and business can be done in the way in which maritime commerce has been carried on for at least half a century, throughout the civilized world. Both parties have agreed to call this a bill of lading; both, by its terms have entered into obligations and acquired rights such as are proper to a bill of lading. All the other incidents in its very

detailed language are such as are proper to such a document. The goods are marked and numbered as stated in the margin, and are to be delivered to the order of the shipper or his assignees, on payment of freight and charges. There are the usual, now in modern times very detailed, provisions and excepted perils. There are provisions for the payment of general average; that the shipper is to be liable to the ship owner for damage owing to his having shipped dangerous goods; and that he shall pay all expenses for reconditioning and gathering of loose cargo. The shipowner is to have a lien on the goods, not only for freight, but for fines, damages, costs and expenses which may be incurred by any defect in insufficient marking or description of contents. It is called a bill of lading many times in the course of the fifteen provisions, and particularly in the last, where it is provided that the shipment, being from New York, shall be subject to all the provisions of certain statutes of the United States, and specially to the well-known Harter Act. The list closes as follows:—

> "'In accepting this bill of lading, the shipper, owner and consignee of the goods, and holder of the bill of lading, agrees to be bound by all its stipulations, exceptions and conditions, whether written, stamped or printed, as fully as if they were all signed by the shipper, owner, consignee or holder, any local customs or privileges to the contrary notwithstanding. If required by the shipowner, one signed bill of lading, duly endorsed, must be surrendered on delivery of the goods.'"

and then the document ends in the time honoured form.

> "'In Witness whereof the Master or agent of said vessel has signed three bills of lading, all of this tenor and date, of which if one is accomplished, the others shall be void.'"

No doubt it appears from the margin that it is the form in use by the Commonwealth and Dominion Line, Ltd., Cunard Line, Australasian Service, trading from New York to Australia and New Zealand, with Funch, Edye & Co. Incorporated, as the American Agents; and it may be said that it is not signed by the master, but by that firm as agents for the master. It is, however, well known that in general ships the master does not usually sign. The bills of lading are signed in the agents' office by the agents. It should perhaps be added that it is evidently contemplated by the document that the shipper will assign his rights and that the assignee or holder of the bill of lading will present the document at the port of delivery, and that his receipt and not that of the shipper, will be the discharge to the ship owner.

Their Lordships conclude that it is a bill of lading within the meaning of the Admiralty Court Act, 1861.

It is next contended on behalf of the appellant, that at any rate no writ *in rem* could be issued against the ship "Marlborough Hill," in respect of any goods, except those which were actually shipped on board, which is no doubt the view which the Supreme Court has taken, as is shown by answer No. 1—an answer from which there is no cross-appeal—and that this being so there is no averment, and at any rate no proof that any of the goods

in question were shipped on board this particular vessel. The language of the endorsement of the writ has already been given, and both it and the affidavits to lead the warrant are not precise and positive that any goods were actually shipped on board the " Marlborough Hill."

As regards the affidavits, their Lordships have not to consider whether they were sufficient in form to support a warrant for arrest, or whether upon such affidavits the proper officer ought to have allowed the warrant to go. The summons was not a summons to set aside the warrant or to release the ship without bail, but to set aside the writ and all further proceedings. Nor was the summons originally taken out on this ground.

Turning to the endorsement on the writ and accepting for this purpose the position that there would be no right *in rem*, except in respect of goods actually shipped on board the particular ship, the endorsement is no doubt open to some objection for uncertainty. But it is not usual to take the extreme course of setting aside a writ for a defect in the endorsement, unless indeed it appears that there is substance behind the objection. And if the several documents which were before the full Court are closely scrutinized, it would appear that the fact that some at least of the goods were shipped was not brought into controversy. The Judge's notes on the argument before him in Chambers were made an exhibit to the Special Case, and it should be observed that when application was made for leave to take the second point, the way in which it was brought before the Judge was that the Counsel for the defendant, using the language of the note, " wished to object that no such action would lie in Admiralty even if brought by each plaintiff separately, or " (and this is to be noted) " some of the claims are outside the jurisdiction of the Court."

Mr. Linton's affidavit states that he is informed by the master, and believes, that separate and distinct bills of lading or shipping receipts were issued for the several goods of the several plaintiffs. This is correct. He proceeds to state that all the goods in respect of which the plaintiffs are claiming were received for shipment under the terms of these bills of lading or shipping receipts, which appears to be an admission that at any rate all the goods were received for shipment. He does not proceed to say that any of them, still less that some of them, were not shipped on board the " Marlborough Hill." In the reasons for the judgment of the full Court, it appears that the first objection was that none of the goods had been carried into the port of Sydney ; a verbal objection to the terms of the statute, which was got over by Dr. Lushington in very early days in the case of the *Danzig* (Browning and Lushington, page 102), a decision which has not since been questioned, and which Counsel for the appellants did not question now. The second objection was that there was no evidence that the goods were in fact ever shipped on board the " Marlborough Hill." On this the full Court observed that—

> " ' in our opinion that objection to the jurisdiction fails, and cannot be given effect to at the present stage,' and again, ' the plaintiffs do not

admit that their goods were not so shipped. At the most their affidavit states that they are uncertain whether they would be able at the trial to prove that fact—a fact which is, as we think, essential to their success.' "

In their Lordships' opinion the full Court dealt with this point in the proper manner. This was not the kind of objection which would warrant a summary dismissal of the action at this early stage, and by this form of procedure, an unusual one, especially if there was no appearance under protest. When the action proceeds, the statement of claim must make the proper averments, and at the trial they must be proved, or the plaintiffs will fail. The defendants have the advantage that they have an expression of opinion by the full Court, and possibly it should be considered as a decision of the full Court, from which there has been no appeal, that the case will fail except as to goods actually shipped on board the "Marlborough Hill." In other words, the opinion or decision of the full Court is that the contract in a bill of lading whatever obligation it imposes upon the ship owner in an action *in personam*, cannot be considered as giving a right *in rem* except for such goods as were actually shipped on board the *res*. From the course this case has taken, this point does not come before their Lordships for decision, and therefore they do not decide upon it; but they desire it to be understood that they have formed no opinion contrary to the view taken by the full Court. It is enough to say that for the reasons given by the full Court, their Lordships think that it was right to allow the action to proceed, unless the second objection, which they are about to deal with, is fatal to it.

This second objection is that each plaintiff ought to have sued separately. On this point authorities upon the construction of the rules of the Supreme Court of Judicature in England were cited. Their Lordships on the whole think that these are not applicable. The matter is covered, so far as the Court in question is concerned, either by Rule 29: "Any number of persons having interests of the same nature arising out of the same matter may be joined in the same action whether as plaintiffs or as defendants," or by Rule 155, already quoted. It might no doubt be that with regard to the new subjects of jurisdiction conferred upon the High Court of Admiralty by the Act of 1861, a different practice should prevail. But at any rate with regard to the subjects of the older Admiralty jurisdiction such an objection as that now raised was unheard of. In an action for collision claims by ship owner, and if the ship were lost, by cargo owner, by master and crew, who had lost their clothes and effects, by representatives of seamen drowned claiming for goods and effects of the deceased, were always joined in one action. In cases of salvage, the owners, master and crew of the salving vessel were always joined. In cases of wages, all the seamen joined in one action, though some of them were taken on board at the commencement of the voyage and stayed to the end, while others may have been shipped or discharged at intermediate ports. If separate actions had been started, the Court would have at once consolidated them, and

probably punished those who had brought separate actions by making them pay the costs up to consolidation. More than this, if two or more vessels were engaged in salvage, even though at different periods, and of a different nature, it was not unusual to join them in one action. In the case cited in argument in the Court below, the *Marechal Suchet* (1896 P., pages 236–237), the propriety of this course was expressly confirmed, and the argument from the general rules of the Supreme Court of Judicature was put aside.

The procedure *in rem* has some different incidents from those appropriate to an ordinary action *inter partes*, and their Lordships think it open to them to consider the general question of convenience in such actions, treating them as being of a special nature.

If each of these twenty or more parties had been obliged to issue a separate writ, and to apply, as would be the consequence for separate warrants, several of them for sums under £10, the costs would be enormous; and it is for the interest of ship owners that joinder of plaintiffs in such cases should be encouraged.

Admiralty jurisdiction originated in the civil law, and never lost all touch and connection with it. Its procedure was malleable and adaptable. The ordinary procedure in such a case as the present would be that if the plaintiffs obtained a primary judgment their several claims would be referred to the Registrar who would deal with each separately, and on his report the Court would deal with the costs. Their Lordships, while thinking it unnecessary that they should give an express construction of the words in Rule 29, are not disposed to interfere with the decision of the Supreme Court, on what they regard as a question of procedure.

Upon the whole their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

In the Privy Council.

THE SHIP "MARLBOROUGH HILL"

v.

ALEX. COWAN AND SONS, LIMITED, AND OTHERS.

DELIVERED BY LORD PHILLIMORE.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1920.