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April 29.

QUEBEC ADMIRALTY DISTRICT

HAMILTON HARBOUR COMMISSIONERS ..... PLAINTIFF;

v.

THE SHIP *WENCHITA* ..... DEFENDANT.

Shipping—"Necessaries"—Wharfage dues—Charter-party.

On May 27, 1926, the defendant ship, a foreign ship, discharged her cargo at the port of Hamilton and loaded another cargo. The plaintiff's dock and warehouse were used by the defendant ship under the authority of the Master thereof. The defendant was bound to incur the charges made for the use of this dock and warehouse before he could discharge his cargo and leave the port of Hamilton.

Held, that such charges were to be considered as "necessaries" within the meaning of the Admiralty Act.

2. That where the plaintiff had no notice of the charter-party and the Master and crew remained the servants of the owners of the ship and there was no demise of the ship to the time charterers, the owners were liable for necessaries ordered and authorized by the Master and were liable for the necessaries above referred to.

ACTION *in rem* to recover the sum of $313.14 for necessaries.

The action was tried before the Honourable Mr. Justice Archer at Montreal.

C. Russel McKenzie for plaintiff.

R. C. Holden, Jr., for defendant.

The facts are stated in the reasons for judgment.

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ARCHER L.J.A., now this 29th April, 1927, delivered judgment.

This is an action *in rem* by which plaintiff claims the sum of $313.43 for necessaries.

The plaintiff was duly incorporated by an Act of Parliament of Canada (2 Geo. V, chapter 98). By the said Act the Hamilton Harbour Commissioners have the power to make by-laws for the doing of everything necessary for the effectual execution of the duties and powers vested in the corporation.

Section 22 of the said Act enacts:—

The rates upon the cargoes of all vessels shall be paid by the master or person in charge of the vessel, saving to him such recourse as he may have by law against any other person for the recovery of the sums paid; but the Corporation may demand and recover the said rates from the owners or consignees or agents or shippers of such cargoes if it sees fit to do so.

Section 24 is as follows:—

The Corporation may, in the following cases, seize and detain any vessel at any place within the limits of the province of Ontario:—

(*a*) Whenever any sum is due in respect of a vessel for rates or for commutation of rates, and is unpaid;

(*b*) Whenever the master, owner or person in charge of the vessel, has infringed any provision of this Act, or any by-law in force under this Act, and has thereby rendered himself liable to a penalty.

Section 10 of the By-laws says:—

No vessel shall leave the harbour until the agent, consignee, shipper, master or person in charge thereof has made and delivered to the office of the Commissioners a full and correct report in writing, signed and certified by him, of her outward cargo, with the description thereof in detail, and its value, and also of her draft of water, nor until all dues on the vessel and on her cargo, and all penalties incurred in respect of the vessel or by the master or person in charge of the vessel, and all costs and charges with which the vessel or the master or the person in charge thereof is chargeable towards the Commissioners, have been fully paid.

Section 11 of the By-laws reads as follows:—

All rates, dues or penalties in respect of any vessel or cargo shall be paid or secured to the satisfaction of the Commissioners before such vessel or cargo leaves Hamilton Harbour, and in default thereof, the Secretary may cause such cargo or vessel to be seized and held therefor, and may require the Collector of Customs to refuse clearance papers to such vessel.

See Maclachlan's Law of Merchants' Shipping, (6th Ed.), p. 571.

On the 27th May, 1926, the defendant ship, the *SS. Wenchita,* a foreign ship registered at the Port of Oslo, Norway, discharged her cargo at the Port of Hamilton of one mil-

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lion and ninety thousand nine hundred and fifty-seven pounds of steel plates and loaded one hundred and sixty-two thousand eight hundred and thirty-one pounds of cargo. The plaintiff's dock and warehouse were used by the defendant ship, with the authority of the master thereof in the loading and unloading of the cargo. The rates on the cargo for said privileges amounting to $313.43 are made as follows:—

Tonnage inward—1,090,957 lbs., at 50c. per ton.	$272 73
Tonnage outward—162,831 lbs., at 50c. per ton.	40 70
Total	$313 43

The plaintiff submits that these charges were charges which the defendant ship was bound to incur before she could discharge her cargo and leave the Port of Hamilton; that they were necessaries within the meaning of the law.

The defendant submits that these charges cannot be considered as necessaries; that the owners of the *Wenchita* had divested themselves by charter-party of the control and possession of the vessel for the time being in favour of the charterers, and that therefore there can be no claim against the ship.

I am of opinion that the charges amounting to $313.43 are to be considered as necessaries.

Roscoe, page 238, says:—

> The definition of the word necessaries has been judicially given as all things fit and proper for the service in which a vessel is engaged, whatever the owner of that vessel as a prudent man would order if present at the time; though primarily meaning indispensable repairs, anchors, cables, sails and provisions, the term has now, it is clear, a wider signification, and has been and is being gradually amplified by modern requirements, as is instanced by the case of *The Mecca*, where canal dues were pronounced to be within the scope of the word. No distinction can be drawn between necessaries for the ship and necessaries for the voyage, and all things reasonably requisite for the particular adventure on which the ship is bound are comprised in this category.

Claims for dock dues, canal dues, have been declared valid in actions for necessaries.

The *St. Lawrence* (1); The *Mecca* (2); *Simpson, Spence & Young* v. *Azpeitia* (3); *William Fleming* v. *Equator* (4).

(1) (1880) P.D. 250.

(2) (1895) 8 Asp. 266.

(3) (1921) 8 Llyod's List, Law Rep. 326.

(4) (1921) 9 Lloyd's List, Law Rep. 1.

We have now to consider the effect of the charter party.

On the 6th February, 1926, a charter-party was entered into between the owners of the *Wenchita* and Frank Lane Co. of the city of New York, whereby the vessel was chartered to the latter for a term of eighteen months.

The charter-party contained several stipulations, and I will cite the most important:—

1. That the owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the captain, officers, engineers, firemen and crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and maintain her class and keep the steamer in a thoroughly efficient state in hull, machinery and equipment for and during the service.

2. That the charterers shall provide and pay for all the coals except as otherwise agreed, port charges, pilotages, agencies, commissions, consular charges (except those pertaining to the captain, officers or crew), and all other usual expenses except those before stated, but when the vessel puts into a port for causes for which steamer is responsible, then and all such charges incurred shall be paid by owners.

Charterers are to provide necessary dunnage and shifting boards, but owners to allow them the use of the dunnage and shifting boards already aboard steamer. Charterers to have the privilege of using shifting boards for dunnage, they making good for any damage thereto.

6. That the cargo or cargoes be laden and or discharged in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide, except at such places where it is customary for similar size steamers to safely lie aground.

18. That the owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter, and the charterers to have a lien on the ship for all moneys paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once.

19. That all derelicts and salvage shall be for owners' and charters' equal benefit after deducting owners' and charterers' expenses and crew's proportion general average, if any, to be according to York-Antwerp Rules, 1890.

If the owners of the ship shall have exercised due diligence to make said ship in all respects seaworthy, and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at the time of shipment or at the beginning of the voyage, but not discoverable by due diligence, the Consignees or Owners of the cargo shall not be exempted from liability for contribution in general average, or for any special charges incurred but with the shipowner, shall contribute in general average and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness.

25. Nothing herein stated is to be construed as a demise of the steamer to the time charterers. The owners to remain responsible for the naviga-

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tion of the steamer, insurance, crew, and all other matters, same as when trading for their own account.

The plaintiffs had no notice of the charter-party. As stated in stipulation 25 of the charter party nothing in the charter-party is to be construed as a demise of the steamer to the times charterers. The master and the crew remained the servants of the owners. (Stipulation No. 1).

It was held in the case of the barge *David Wallace* v. *Bain* (1):—

Where, by the charter-party, the owner transfers the possession and control of the ship to a charterer and the latter appoints the master and crew and pays their wages and other expenses, the master in incurring a debt for necessaries is not the agent or servant of the owner. In such a case the owner is not the debtor, and an action for such necessaries cannot be maintained against the ship.

In the case of *Scheibler* v. *Furness* (2), Lord Herschell L.C., says:—

But there may be two persons at the same time in different senses not improperly spoken of as the owners of a ship. The person who has the absolute right to the ship, who is the registered owner, the owner (to borrow an expression from real property law) in fee simple, may be properly spoken of, no doubt, as the owner, but, at the same time, he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person who, during that time, may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers, and crew of the ship, pays them, employs them, and gives them their orders, and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of the vessel, rest upon that person, who is, for those purposes during that time, in point of law, to be regarded as the owner. When that distinction is once grasped it appears to me that all the difficulties that have been raised in this case vanish. There is nothing in your Lordship's judgment, as I apprehend, which would detract in the least from any of the propositions which have been laid down with regard to the power of a master to bind an owner, or with regard to the liabilities which rest upon an owner. The whole difficulty has arisen from failing to see that there may be a person who, although not the absolute owner of the vessel, is, during a particular adventure, the owner for all those purposes.

Is there anything in the authorities which runs counter to the view which I have just expressed? I can find nothing. Not a single authority has been cited in which the owner of a vessel has ever been held liable on a bill of lading, or as for a tort in the improper navigation of or dealing with a vessel in any case in which the master of the vessel, or those who were guilty of the negligence, have not been properly described as the servants of the owner. *No doubt a vessel may be chartered, and the charterers may have, during its continuance, full power to deal with the vessel, to determine her voyage, and to direct the course that she*

(1) (1903) 8 Ex. C.R. 205, at p. 206.

(2) (1893) 1 The Reports 59, at p. 64.

shall take, where, nevertheless, the master and crew remain truly the servants of the owner. In that case I apprehend it is perfectly clear that by reason of the relationship still subsisting the owner becomes bound by such a contract as a bill of lading, and by all the contracts which a master can ordinarily make, and which persons, therefore, have a right to presume he is authorized to make, binding the owner.

In the same case Lord Watson, at page 69, says:—

No doubt when a shipowner who enters into a charter without parting with the possession and control of his ship seeks to limit the powers assigned by law to his captain, the limitation will be altogether ineffectual in any question with shippers who are ignorant of the terms of the charter. That, however, is a question as to the limitation of the powers of an actual agent who has known powers according to law. Notice of any limitations must be given to those who deal with the agent upon the footing of fact that he is the agent; there must be such notice in order to disable them from contracting with him. But where you are dealing with a person who is not an agent, I know of no authority which requires that notice shall be given when a man parts with the possession and control, even temporarily, of a ship of which he is the registered owner.

It is not necessary to refer to several other cases which were cited at Bar, as in those cases the plaintiff had notice of charter-party and its stipulations.

In the present case, the plaintiff had no notice of the charter-party, the master and crew remained the servants of the owners, and there was no demise of the ship to the time charterers.

Applying the law as I find it in the above authorities, I am of opinion that the owner is bound to pay for the necessaries, and in this case plaintiff is entitled to judgment for the sum claimed.

Judgment accordingly.

Solicitors for plaintiff: *Brown, Montgomery & McMichael.*

Solicitors for defendant: *Meredith, Holden, Heward & Holden.*