PRINCE EDWARD ISLAND ADMIRALTY DISTRICT.

1917
Sept. 21

NEVILLE CANNERIES LTD.

v.

"SANTA MARIA."

Admiralty—Seizure for towage—"Ship"—Divisibility of contract—Maritime lien.

A vessel built for show and not for transportation is a "ship" within the meaning of admiralty law and is subject to seizure for towage.

A towage agreement providing for payment *per diem* is a divisible contract as to each day's services performed; but there can be no recovery under the contract in the event of a prolongation of the voyage through the plaintiff's unjustifiable delay. A bond taken as security is not evidence that the towage was performed on the credit of the master and not of the ship. There is no maritime lien for the towage, only a statutory lien, in the form of a right to seize the tow in satisfaction of the claim.

ACTION *in rem* brought by Neville Canneries, Limited, whose head office is in the City of Halifax in the Province of Nova Scotia, to recover $3,275 being balance of a claim for alleged towage services under a contract, claimed to have been entered into between the plaintiff and the captain of the ship "Santa Maria," for the towing of the said ship from Cape Cod Canal in the United States of America to the City of Quebec in the Province of Quebec at a certain rate of payment per day from the time the plaintiff's tug boat should have left Halifax in performance of this contract until she should return thereto after completion of the same.

D. D. Shaw, *A. B. Warburton*, K.C., and *C. J. Burchell*, K.C., for plaintiff.

W. E. Bentley, K.C., and *J. J. Johnston*, K.C., for defendants.

STEWART, L. J. (September 21, 1917), delivered judgment.

In terms of an order made on March 12, 1916, Charles Stephenson, of Cambridge, in the State of Massachusetts, and Andrew Kaul, Jr., of Merrill, in the State of Wisconsin,

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appeared in this case under protest. The case came on for trial on September 4, at Charlottetown, and continued for 4 days when it was adjourned for judgment.

The contract proved at the trial was made and entered into on September 14, 1916, between the plaintiff and the captain of the "Santa Maria" and is embodied in certain telegrams which passed between the plaintiff and the captain on September 13 and 14 of that year. By this contract the plaintiff undertook and agreed to tow, as expeditiously as possible, the "Santa Maria" from Cape Cod in the U. S. of America to the City of Quebec in Canada, for the consideration or sum of $75 a day from the time the plaintiff's towboat should have left Halifax for Cape Cod until she should return thereto after completing her contract. Should any accident occur to the "Santa Maria" and she be not in condition to tow, any delay which might occur in consequence should be at the expense of the "Santa Maria." On the same day that the contract was made, the payment of the *per diem* charge of $75 was guaranteed to the plaintiff by the Massachusetts Bonding and Insurance Co.

It appeared to be taken for granted by both sides, although not proved, that the "Santa Maria" was a replica of the ship on which Columbus sailed from Spain in 1492 on his famous voyage of discovery and in which he discovered America.

She appears to have arrived in America some time in 1893 and was on exhibition in Chicago at the time of the World's Fair in that year, and apparently has been there ever since until she set out on her voyage in 1914. Being at Cape Cod in September, 1916, and desiring to return to Chicago by way of Quebec the contract in question was then entered into. The plaintiff in furtherance of its contract sent its tug "Mouton" from Halifax on Sept. 17, 1916, to go to Cape Cod to meet the "Santa Maria." The "Mouton" on leaving Halifax had on board as cargo 129 bbls. and 75 half bbls. pickled fish, and 14 half cases lobsters. She arrived in Boston at 11.30 a.m. on September 19, and there discharged her cargo and took on coal and water. In addition she took on a cargo of 25 tons of anthracite coal and about 40 or 50 empty lobster crates.

This cargo, the president of the plaintiff company in his evidence stated, put the tug in good trim to do her towing. The "Mouton" had a gross tonnage of 5,321, a registered tonnage of 36.19 and 106 h.p. engine and would carry about 75 tons. She was built in Liverpool, N.S., in 1913. Length 82 ft., breadth 17 ft., depth of hold 6 ft. 18 in., and was manned by a captain and 4 men.

She left Boston at 6.30 a.m. on September 21, arriving at Sandwich at mouth of Cape Cod Canal. She left there the same day with the "Santa Maria" in tow and reached Yarmouth at 5.30 p.m. on September 24. Taking in water and coal at Yarmouth she left there on September 25, at 12.45 p.m., and arrived at Halifax at 8 a.m. on September 27. Here she discharged her cargo and took on the following new cargo, namely: 125 bbls. and 75 half bbls. pickled fish. These, the president of the plaintiff company stated, were put on to put the tug in proper trim for towing and were to be carried to Quebec. Left Halifax for Quebec at 10 pm.. on September 28, arriving at Port Hastings at 12.30 a.m. on September 30. Detained at Port Hastings until 10 a.m. of October 3, when she set sail and made for Charlottetown, arriving there at 2 p.m. on October 4. The next day she sailed at 7 a.m. and at 7 p.m. reached 5 miles from Cape Jourimain, and on account of alleged heavy head wind ran back to Charlottetown where she remained until October 12, detained, as claimed, by strong winds except on one occasion on October 7, when she was unable to depart by reason of acting Captain Cook of the "Santa Maria" not being on hand. Left Charlottetown at 5 a.m. on October 12, weather fine but had to put back at 11 a.m. on account as alleged of a strong breeze arising, and arrived at Charlottetown at 5 p.m. The tug and tow remained in Charlottetown until October 21. On October 19, which was a fine day, no start was made because, as claimed by the captain of the tug, the acting captain of the "Santa Maria" refused to leave Charlottetown until he heard from Capt. Stephenson. On October 21 Capt. Stephenson discharged the tug from the further performance of her contract and on October 25 she started on return to Halifax, arriving there on October 29 at 8 a.m.

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Mr. Bentley in the able argument which he presented to the Court rested his defence on the following grounds:— (1) The "Santa Maria," built by the Sovereign or government of Spain and presented to the government or people of the United States has been cared for and maintained, as the symbol of an important historical event, by the South Park Commissioners of the City of Chicago, who hold it as trustees for the people of that country, it would be an infringement of international comity if condemned and sold by an order of this Court. (2) That the "Santa Maria," built and designed for show purposes and not for transportation, is not a ship within the meaning of admiralty law and practice, and her seizure under warrant was illegal. (3) There is no maritime lien for towage and in the absence of personal liability on the part of the owner for services performed there can be no arrest for towage. (4) The towage was not performed on the credit of the ship or its owners but on that of Capt. Stephenson and his guarantee the Massachusetts Bonding Co. (5) The tug was not sufficient for the requirements of the contract and the plaintiff broke his agreement to perform his contract expeditiously. (6) The contract, being indivisible, must be fully performed before any liability arises. Counsel for the plaintiff, besides opposing all the defendant's grounds, contended that it was part of the contract that the tow should be in good condition, whereas she was leaky, of weak construction, covered with barnacles, had no boat, no anchors, and no hoisting gear, and could only go out in fine weather.

As to the indivisibility of the contract and the necessity of its completion before any liability can arise it seems to to me that the agreement to pay $75 a day for the services of the tug gave the plaintiff a cause of action against the tug for each day's services performed until the whole journey was completed and that he was not obliged to wait until then before enforcing his claim.

Is the "Santa Maria" a ship that can be arrested in such a proceeding as was taken in this case? She is declared to be a replica of the vessel in which Columbus crossed the Atlantic in the year 1492. She had sails, a rudder and masts,

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but was not built, I would judge, to do the work of transporting either goods or passengers.

The statute, in no manner, limits the jurisdiction of the Court. All claims in respect of towage come under it and no attempt is made to define or limit the kind of craft that towage services may be performed for.

The Admiralty Courts Act, 1861, 24 Vict. ch. 10, gives the following definition of a ship. "Ship shall include any description of vessel used in navigation not propelled by oars."

Similar definitions are given in the Vice-Admiralty Courts Act, 1863, 26 Vict. ch. 24, and the Merchants Shipping Act, 1894.

See also the following cases:—*The "Mac,"*[1] *"Mersey Docks and The "Zeta,"*[2] *The "Excelsior,"*[3] *The "Uhla,"*[4] *The "Sinquasi"*[5] *The "Malvina,"*[6] *The "Clara Killam."*[7]

The Court of Admiralty appears from early times to have exercised an inherent jurisdiction over claims for towage in cases where the services were rendered on the high seas and not within the body of a county and some cases have gone the length of holding that towage on the high seas conferred a maritime lien. *The "Isabella,"*[8] *The "Constancia,"*[9] *The "Princess Alice,"*[10] *The "St. Lawrence."*[11]

There has been considerable difference of opinion as to the nature of the inherent admiralty jurisdiction in matters of towage, especially as to whether or not it created a maritime lien.

By the Admiralty Court Act, 1840, 3 & 4 Vict. ch. 65, sec. 6, jurisdiction was given to the Admiralty Court over all claims and demands in the nature of towage in respect of services rendered whether within the body of the county or upon the high seas, and similar jurisdiction was conferred upon the Vice-Admiralty Courts by sec. 10 of the Vice-Admiralty Courts Act 1863, 26 Vict. ch. 24.

These statutes did not give a maritime lien on the ship but only enabled the plaintiff to enforce his claim in the

[1] (1882), L.R. 7 P.D. 126.
[2] [1893] A.C. 468.
[3] (1868), L.R. 2 A. & E. 268.
[4] L.R. 2 A. & E. 29 n.
[5] (1880), L.R. 5 P.D. 241.
[6] Lush. 493.
[7] (1870), L.R. 3 A & E.. 161.
[8] 3 Hagg. Adm., 427.
[9] (1846), 10 Jur. 845.
[10] 3 Rob. Adm. 138.
[11] (1880), L.R. 5 P.D. 250.

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Admiralty Court by arresting the ship. A claimant proceeding under the Act would have no right against the ship until commencement of his action.

The Court having jurisdiction over the subject-matter by virtue of the statute, the arrest in the action gives precedence to the claim over all except liens existing at the time of the arrest. This is what is known as a statutory lien and gives the claimant no lien upon but only a right to proceed against the ship.

It has been held in several cases that although jurisdiction as to towage was not created by statute but existed before, it conferred no maritime lien. See the "*Henrich Bjorn*;"[1] *Westrup v. Great Yarmouth Steam Carrying Co.*[2] As against this, counsel for the plaintiff cited a case decided in the Privy Council: *Foong Tai & Co. v. Buchheister & Co.*[3] But this authority does not question the soundness of the law as declared in the "*Henrich Bjorn*," and *Westrup v. Great Yarmouth Steam Carrying Co.* cases. The expenditures defrayed by the respondents in that case was in the nature of salvage expenditure.

Fry, L. J., in giving the judgment of the Appeal Court in the "*Henrich Bjorn*" case,[4] draws a very illuminating distinction between the right to enforce a lien against a ship and the right to arrest her to enforce a claim that the plaintiff has against the owner; in other words, between a maritime and a statutory lien.

Lord Watson discussing the same point in that case in the House of Lords uses equally apt language. He says,[5] "The former unless he has forfeited the right by his own "laches can proceed against the ship notwithstanding any "change in her ownership, whereas the latter cannot have "an action *in rem* unless at the time of its institution the "*res* is the property of his debtor."

It seems to me that the weight of authority is against the proposition of the existence of a maritime lien for towage.

[1] L.R. 10 P.D. 44; 11 App. Cas. 270.
[2] 43 Ch. D. 241.
[3] [1908] A.C. 458.
[4] 10 P.D. 44, at p. 54.
[5] 11 App. Cas. 270, at p. 277.

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A good deal of discussion arose as to the necessity of its being shewn that the towage was performed on the credit of the ship.

Language of this kind is frequently used in Admiralty cases by both Judges and counsel.

In *The "Perla,"*[1] Dr. Lushington says there is a presumption that credit is given to the ship and to rebut this presumption it must be distinctly proved that credit was given to the individual only whoever he may be.

Other cases decide that necessaries supplied to a ship are *primâ facie* presumed to have been supplied on the credit of the ship and not solely on the personal credit of her owners.

A ship can scarcely be said to be the object of credit. It certainly cannot give or refuse credit. I presume what is meant is this, that the owner of a ship either by himself or his master can so contract either for necessaries or for towage as to make himself alone personally liable; that in the contract by the use of apt words he can exclude the ship from all liability to proceedings *in rem* in Admiralty.

Where the ordinary agreement is made, the presumption is that credit is given to the ship, but this does not mean that the owner may not be rendered liable for the services performed in an action *in personam*.

Contracts of towage are interpreted and construed in the same manner as other contracts.

Where a contract of towage purports to be made on behalf of the owner he, and therefore the ship itself, can only be made liable where it has been entered into by one who was the owner's agent or servant acting within the scope of his authority.

If the owner of a ship divests himself by charterparty or otherwise of all control and possession of his ship for the time being, in favour of another who has all the use and benefit of it, and who appoints and pays the captain and crew, he will not, neither will his ship, be liable for towage performed for the ship by agreement with the charterer or his captain during such time. Before the owner can be made liable for the act of the captain they must stand in the relation to each other of master and servant, or princi-

[1] Swab. 353.

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pal and agent, or at any rate some such relationship must exist between them.

I will now come to the evidence and the merits of the case. There is no evidence that the "Santa Maria" was either built by the Sovereign or government of Spain or presented by such Sovereign or government to the government or people of the United States or that she is owned by the South Park Commissioners of the City of Chicago. Counsel for both parties at certain stages of the case appear to have assumed something of the kind, but no evidence was given at the trial. No one appeared for the United States Government or the South Park Commissioners.

When I am asked to stay the hand of the Court for fear of trespassing on international comity I would like to have something more substantial than faint assumptions of counsel which, so far as the evidence goes, appears to have no warrant for existence.

I am unable to state from the evidence who the owner of the "Santa Maria" is. I know nothing on that head except that in September, 1916, she was in charge of Capt. Stephenson at Cape Cod who entered into the contract in question with the plaintiff.

Primâ facie the master is the agent of the owner of the ship, and in the absence of evidence that he was the agent of another I find that the contract of towage then entered into bound the owner and enabled the plaintiff to enforce in this Court any claim he has for such towage against the ship.

It is claimed by Mr. Bentley that the plaintiff's counsel in opening the case admitted that Capt. Stephenson had chartered the "Santa Maria" from the South Park Commissioners. The counsel in his opening on this point spoke as follows:—

"This ship, the 'Santa Maria,' is a replica supposed to "be a replica of the flag ship of Christopher Columbus with "which he discovered America. She was built by the Spanish "government in the year 1892 or '93 and was presented "to the government of the United States, and she came out "to America at the time of the Chicago exhibition in '93, "and subsequently she was presented to the City of Chicago "or rather a Commission of Chicago who are now the

"present owners. She has been lying there for some time, "I don't know how many years, and shortly before the "opening of the Panama Canal Mr. Stephenson, who "appeared as the captain of the ship, made arrangements "with the Park Commissioners to get this vessel to take "her round to Panama. . . . I don't know upon what "terms she was loaned or let or chartered by the Commis- "sioners but I believe there is an agreement which we gave "our learned friends notice to produce which was made "between the parties. But at any rate we say that at the "time we entered into this contract we did not know or have "anything to do with the owners. They were unknown to "us and we dealt with the captain upon the credit of the "then ship herself."

John A. Nevill, the president of the plaintiff company, in his evidence, stated that he was not aware as to who were the owners of the ship at the time that he dealt with Capt. C. Stephenson, the master of the "Santa Maria," and gave credit to the ship for the towage. He also stated that he knew nothing of an agreement between the South Park Commislsoners and the captain at the time the contract was made.

I would not hold, from this evidence, that the captain when he made the contract with the plaintiff had the full and complete control and possession of the ship and had no responsibility whatever to the owner whoever he might be. That he had in other words what was practically a demise of the ship.

See also on the question of the effect of remarks made by counsel in opening the comments of Pollock, C. B., in *Machell v. Ellis*.[1]

Besides I don't think the remarks of counsel were intended as an admission. I am inclined to believe that they were prompted by a perusal of a brief filed by the defendants' counsel on a preliminary motion in which similar statements were made and he probably assumed that proofs would be forthcoming at the trial.

The fact that the plaintiff took a guarantee from the Massachusetts Bonding Co. was urged as a circumstance

1 Car. & K. 682.

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that credit was given to the captain alone and not to the ship, but Mr. Nevill in his evidence stated that he took the guarantee as additional security in the event of the ship being lost on the voyage.

Having disposed of all the preliminary points it is left for me to determine the amount which the plaintiff is entitled to recover in this suit.

There was an implication in the contract that the tug boat which the plaintiff should supply should be sufficient for the performance of the work undertaken, also that each party to the contract would perform his duty in completing it, that proper skill and diligence would be used on board both the vessel and the tug, and that neither party by neglect or mismanagement would create unnecessary risk to the other or increase any risk which might be incidental to the service undertaken.

I hold on the evidence that the tug was reasonably sufficient for the requirements of the contract. I also hold as against the plaintiff that the tow was under the circumstances in reasonably good condition.

The plaintiff towed her with the tug Atlantic some time before the contract litigated here was entered into from Port Hawkesbury to Portland, Maine, a distance of 345 miles, taking 13 days.

I have the testimony of the captain of that tug who performed the service, that on that trip she pitched, rolled, and sheered badly. When the plaintiff made his contract on September 14 he evidently knew all about the kind of tow he would have and made his charge accordingly.

I also decide that the plaintiff should not have undertaken to carry freight from Halifax to Boston and from Boston to Halifax and from Halifax to Quebec, and hold him liable for all delays in consequence.

If the tug required ballast to fit her for her work it should have been put in and left there till the contract was completed. The tug arrived in Boston on Tuesday, September 19, at 11.30 a.m., and left for Cape Cod on September 21 at 6.30 a.m. The two days in Boston were fine and the only business was to replenish with coal and water for which one day would have been ample. I must conclude that the other day was spent in unloading and perhaps

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selling cargo, and taking on new cargo. I will deduct from the claim $75, being 1 day's charge.

She left Halifax on September 28 at 10 p.m. after being there over a day and a half and arrived at Port Hastings September 30 at 12.30 a.m. Capt. Paysant, the captain of the tug, states in his evidence that he called at Port Hastings for water. Port Hastings is only a few hours steam from Georgetown and about a day from Charlottetown. It only took him 1 day, 14 hours and 30 minutes, to reach Port Hastings from Halifax. He also stated, and that after careful consideration, that he could run 3 days without requiring to replenish his water supply, and that he carried 16 tons of coal, enough for 8 or 9 days. He had tank capacity for 500 gallons of water. There was no necessity for his going to Port Hastings for water. That was not performing the contract expeditiously. Besides, shortness of water is the reason he gave for being obliged to put into Charlottetown on October 4, although it was only 1 day and 4 hours since he had taken on water at Port Hastings. He said there was delay at Port Hastings on account of weather and wind, although his entry in his log states that the wind was southeast, thick, rainy. The wind was quite favourable for either Georgetown or Charlottetown. There was no mention in the log of the wind being high, and if the weather was rainy and thick that would be no obstacle to further progress unless there was a fog which he does not claim, nor does he state when or how long after he arrived it became rainy and thick; evidently not when he went in, because he gives in his evidence, as the cause of his doing so, the need of getting water. But he should have got a supply for at least 3 days at Halifax, and that would have easily carried him to Charlottetown. He further stated he was putting coal in the bunkers at Port Hastings, although, according to his own evidence, he could have taken on enough at Halifax for 8 or 9 days' use. When he was referred by counsel to the wind being favourable for a passage to Charlottetown, he said that it was liable to change any minute, and that that was the reason he remained there, because as he stated the wind was liable to change any moment "we remained there and drift us back to Port Hastings." I will have to deduct

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from the plaintiff's claim the 3 days lost around Port Hastings.

The captain of the tug remained in Charlottetown from the 4th until the 25th of October with the exception of two abortive attempts made to proceed on the voyage.

I may state here that I am not all satisfied with his evidence and the manner in which he gave it, and the record of his trip in the log book kept by him bears a somewhat suspicious appearance. He stated in his evidence that 4 miles an hour was a fairly strong breeze and that 6 miles an hour would be a strong breeze, that 6 miles an hour would be a moderate gale and 12 or 14 miles an hour would be a real gale. He also stated that the did not know of any great reason why he didn't proceed upon the trip on the evening of October 7, that the wind did not prevent him doing so.

On October 9 he stated that he had 12 hours wind astern which was favourable to his going and that he could have got up the straits 48 miles in those 12 hours if he had proceeded on his journey on that day but didn't go.

This captain was a man of some experience. He has held a master's certificate for 4 years and has had experience at sea since he was 14 years old. I am satisfied from the evidence that he failed to perform expeditiously the contract undertaken, and that the delays in Charlottetown were unjustifiable and for that reason and because the cold weather was approaching when it would be impossible to complete the towage to Quebec except at great risk both of life and property, Capt. Stephenson of the "Santa Maria" was justified in discharging the tug and laying up the tow for the winter. I am of opinion that if the tug had done her duty the contract would likely have been completed in good time and that the many days unwarrantable delays that occurred prevented such completion.

The plaintiff made an absolute and unqualified contract to tow the "Santa Maria" from Cape Cod to Quebec and was receiving good pay for the service. The contract could, I believe, have been completed, if energy, efficiency, courage, and proper expedition had been used by the tug. It should have been completed within a reasonable time. The distance given was about 1,100 miles and the estimate

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made by the plaintiff and given to Capt. Stephenson for the performance of the tow was with favourable weather 17 days. It could never have been completed by following the course which the captain of the tug took during the time he was in and about Charlottetown and Port Hastings. The defaults on the part of the tug were such as to defeat the purpose of the contract and so put an end to it.

The plaintiff has only a right to recover compensation for what he has done.

A part of the consideration was to be paid before the entire service was to be performed and a certain portion was to be paid on the completion of the contract, I mean for the days it would take the tug to return to Halifax after completing the voyage to Quebec. This rendered the service *pro tanto* a condition precedent and as this service is not completed by reason of the default and breach of the plaintiff it cannot recover for the four days claimed for the return to Halifax.

The plaintiff has already been paid $1,009.60. I will allow the plaintiff for 12 days while his tug was in Charlottetown. I allow for the days subsequent to the discharge of the tug on October 21. I have deducted 5 days from the time spent in Charlottetown previous thereto because I am satisfied that, on the evidence of the captain himself, he could have proceeded with his tow on these days.

I find that the plaintiff is entitled to recover in this action the sum of $940.40 in respect of his claim together with costs, and I condemn the ship "Santa Maria," her sails, apparel, dunnage and equipment, and other artcles of value on board, including the Columbus relics, in the said sum and in costs; and declare that the plaintiff has had and still has a valid lien and charge on the said ship, her sails, articles and equipment for the said sum and costs, since her arrest under the warrant issued in this suit, and I order that in default of payment of the said sum and costs, the said ship, her sails, apparel, equipment and other articles on board thereof be sold by public auction by the marshal of this Court, and the proceeds thereof paid into Court to abide the further order of the Court.

Judgment for plaintiff.