

1923

March 8.

NOVA SCOTIA ADMIRALTY DISTRICT

J. H. LAVALLEE ET AL.....PLAINTIFFS;

AGAINST

THE SHIP *ISTAR* AND HER CARGO*Shipping—Jurisdiction—Breach of Contract—Sections 6 and 35 of the Admiralty Court Act, 1861.*

Plaintiffs agreed to purchase from certain parties in England a quantity of whisky, the shippers to deliver the same at an agreed point not less than 20 miles off the Atlantic Coast of U.S.A. or at St. Pierre, Miquelon, etc., such point of delivery to be between latitudes 22 and 50, etc.

The contract did not purport to be made by or on behalf of the ship, but by the shippers, with the plaintiffs.

Plaintiffs now claim damages for breach of contract for non-delivery, and at their request a warrant to arrest the ship *Istar* and her cargo was issued, and she was thereupon arrested, to satisfy such claim.

*Held*, that the plaintiffs not having been shewn to be "the owners, or consignees or assignees" of the Bill of Lading of the cargo, within the meaning of section 6 of the Admiralty Court Act, this court had no jurisdiction in the matter, and that the warrant of arrest should be set aside.

2. That the contract referred to in said section 6 contemplates an obligation on the part of the ship, and that the contract sued on herein imposes no such obligation.
3. That the *res* referred to in said section 6 is the ship and not the cargo.

MOTION on behalf of the ship *Istar* to have it declared that the Court has no jurisdiction herein and to have the warrant of arrest set aside.

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Motion now heard before the Honourable Mr. Justice Mellish at Halifax.

*L. A. Lovett, K.C.* for the ship *Istar*.

*W. A. Henry, K.C.* for the plaintiffs contra.

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

MELLISH, L.J.A. now this (8th March, 1923) delivered judgment.

In this action the endorsement of claim on the writ is as follows:—

The plaintiffs claim the sum of \$300,000 against the ship *Istar* and her cargo for damages for breach of a contract for the carriage and delivery of the cargo, now in the port of Halifax of the ship *Istar* consisting of about twenty thousand cases of whisky, the said contract being in writing and dated the 7th day of December, 1922.

The writ is dated 5th March, 1923. On this date the plaintiff James Henry Lavallée made the following affidavit.

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I, James Henry Lavallée at present at Halifax in the county of Halifax, merchant, make oath and say that I the said James Henry Lavallée and Albert Brosseau have a claim against the ship *Istar* and her cargo now in the port of Halifax for damages for breach of contract dated 7th December, 1922, for delivery of the said cargo.

And I further make oath and say that the said claim has not been satisfied and that the aid of this court is required to enforce it.

Albert Brosseau mentioned in this affidavit is the other plaintiff.

Upon the same day (March 5) the ship was arrested under a warrant issued by the Registrar on the said affidavit and is now held by the Marshal of the court under the said warrant with her cargo.

An appearance was entered on behalf of the owners of the ship and her cargo and a summary motion was made on notice before me on behalf of such owners to set aside the writ and warrant and to release the ship and cargo without bail.

The grounds upon which this motion is made are the following.

1. Because this honourable court has no jurisdiction herein.
2. Because there is no allegation that the plaintiffs are or that either of them is the owner, consignee or assignee of any bill of lading of the goods or any part thereof carried into the port of Halifax or any port in Canada in said ship *Istar*, and because the fact is that said plaintiffs are not nor is either of them such owner, consignee or assignee.
3. Because there is no allegation of any breach of any contract on the part of the owner, master or crew of said ship *Istar*, and because the fact is that there has been no breach of any contract by the owner, master or crew of said ship.
4. Because the writ of summons herein and the endorsement of claim thereon does not state any cause of action over which this honourable court has jurisdiction.
5. Because the affidavit to lead warrant does not state the nature of any claim of plaintiffs within the jurisdiction of this honourable court.
6. Because of other defects appearing on the face of the proceedings herein.

The action is *in rem* against the ship and cargo.

If the court has jurisdiction to entertain the action it must I think admittedly be conferred by sections 6 and 35 of the Admiralty Court Act, 1861.

Section 6 as quoted in Mayers Admiralty Law and Practice (1916) at p. 159 is as follows, in so far as relevant:—

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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 (Canada) 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 . . . .

And section 35 provides:—

The jurisdiction conferred by this act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*.

Having regard to the provisions of section 6 above quoted the *res* referred to in section 35 is clearly I think the ship and not the cargo.

The contract referred to in the endorsement of claim and in the affidavit leading to the warrant of arrest was produced on the hearing and is as follows:—

An agreement made this seventh day of December, 1922,

Between: William John Herival and Sidney Peck Herival and Warwick Brookes (hereinafter called the shippers) of the one part, and James Henry Lavallee and Albert Brosseau (hereinafter called the purchasers) of the other part. Whereas the shippers have made arrangements to acquire and ship quantities of whisky and to have the same landed in certain ports or transhipped at sea, it is hereby agreed:—

1. The purchasers agree to purchase from the shippers a quantity of whisky which shall not be less than ten thousand cases (a case shall mean twelve bottles of reputed quarts) and not more than twenty thousand cases of the quantity within these limits to be at the option of the shippers (hereinafter called the cargo) at the price of \$16.25 (sixteen dollars and twenty-five cents) United States currency per case which price shall include the price of the whisky and the freight.

2. The shippers will deliver the cargo at an agreed point not less than twenty miles off the Atlantic Coast of the United States of America and/or St. Pierre, Miquelon or a Newfoundland port or Nassau in the Bahamas, but no point of delivery or port shall be north of latitude fifty or south of latitude twenty-two, provided always that the point of delivery shall be in any case in a latitude free of ice.

3. The price of \$16.25 (sixteen dollars and twenty-five cents) shall be an inclusive price to the point of discharge whether it be transhipped at sea or discharged at a port, but shall not include the cost of unloading or transhipment beyond the ordinary work required to put the cases over the side of the shippers' vessel, and the delivery of the cargo shall be deemed to be completed when the ship has arrived at the point or port as directed within the limits mentioned in clause 2.

4. The cases of whisky shall be paid for in United States gold certificates before any of the same are lifted from the ship.

5. The shippers have rendered to the purchasers an invoice for the last two thousand five hundred cases, a copy of which is attached to this agreement and marked schedule 2 and the purchasers shall pay to the shippers a sum of £7,000 (seven thousand pounds sterling) on account of the said invoice on the signing of this agreement receipt of which is hereby acknowledged.

6. The cargo is to be composed of as many of the brands of whisky and in quantities as nearly as possible as those specified by the purchasers in the schedule 1 hereto, always provided that no brands shall be selected that shall cost the shippers more than fifty shillings per case out of bond, and should any of the whisky selected cost the shippers more than fifty (50) shillings out of bond (one thousand cases of Peter Dawson Old Curio brand excepted) the purchasers shall pay to the shippers in sterling or in United States currency at the rate of the exchange of the day, the difference between the price of fifty shillings and the purchase price as and when the original purchase price is paid.

7. The purchasers shall be allowed twenty-one clear days in which to take delivery after the arrival of the ship at the agreed point (or ten clear days in the case of unloading in a port) and if at the end of this, delivery has not been taken by the purchasers the shippers shall have the right in conjunction with the representative of the purchaser on board to dispose of the cargo or balance of the cargo as they think fit and any loss that may be incurred to the shippers, owing to the cargo not being delivered as originally provided for, shall be made good by the purchasers to the shippers out of the money paid them under clause 5 against the last part of the cargo.

8. When delivery has been taken by the purchasers of fifteen thousand cases or more the shippers will at the purchaser's request return to England with the remaining cases on board (not exceeding five thousand) and re-deliver them at a point of discharge on the ship's next voyage and store them during the interval on the ship free of any charge or freight, or failing the ship not making a second voyage on this business, deposit them in a bonded warehouse at an English or Scotch port or tranship them to another ship in the same port free of charge on the condition that the purchase price of the same \$16.25 (sixteen dollars twenty-five cents) per case is paid by the purchasers to the shippers within forty-eight hours of the ship arriving at an English or Scotch port immediately after the voyage, the subject of this agreement always providing that any custom charges shall be paid by the purchasers.

[His Lordship here recites the schedules to the agreement.]

This contract it will be observed does not purport to be made by or on behalf of the ship but by the shippers with the plaintiffs.

The claim is for damages for breach of contract and under section 6 of the Admiralty Court Act above quoted the breach must be on the part of the owner or of the master or crew of the ship for whose acts the owner might be responsible, but there is apparently no contract between the plaintiffs and the owner of the ship.

It is I think a pre-essential under said section 6 that the plaintiffs should be the owners or consignees or assignees of the bill of lading of the cargo.

In answer to the motion an affidavit of the plaintiff

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Lavallee was read stating that the plaintiffs claim to be owners of the cargo, but it does not appear that there is any bill of lading showing any interest in the plaintiffs and I cannot conclude that such a claim is well founded. There is also a clause in this affidavit to the effect that the *Istar* is owned as deponent verily believes by two of the three shippers, but the ship's register was produced showing that the ship is owned by Jeremiah Brown & Company, Limited.

Exception was taken to the appearance on the ground that it did not give the names of the owners of the ship and cargo, I would allow an amendment to this if necessary, but I think the motion could be made without entering an appearance.

The plaintiffs asked to amend the endorsement on the writ, and it was suggested on plaintiffs' behalf that I should allow the action to proceed leaving it open to plaintiffs to supply later if they could, evidence which might justify the proceedings.

As the facts stand before the court the action is one which I think cannot be entertained. The contract referred to in said section 6 contemplates, I think, an obligation on the part of the ship-owners to some one interested in the cargo, and is not, I think, such a contract as is relied on as the basis of this action. And I think to justify the arrest the plaintiff should be in a position to furnish such facts as would at least show *primâ facie* a case within the jurisdiction of the court.

Under these circumstances I think I have no alternative but to set aside the warrant of arrest.

If the plaintiffs in view of the foregoing nevertheless still desire to amend the endorsement on the writ I will hear the parties further as to this, but in the meantime the ship and cargo will be released.

The ship-owners will have the costs of the application.

*Judgment accordingly.*

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