[HIGH COURT OF AUSTRALIA.—IN ADMIRALTY.]

ROSENFELD HILLAS & CO. PROPRIETARY LIMITED . . . . . } PLAINTIFF;

AGAINST

THE SHIP FORT LARAMIE . . . . DEFENDANT.

H. C. OF A. 1922.

MELBOURNE, *May* 24-26; *June* 1.

KNOX C.J.

Ship—Carriage of goods—Bill of lading—How far conclusive evidence of shipment of goods—Goods in fact not shipped—Bill of lading signed by managing owner—Liability of other owners—Estoppel—Action in rem—Liability of ship—Goods Act 1915 (*Vict.*) (*No.* 2663), *sec.* 72—*Admiralty Court Act* 1861 (24 *Vict. c.* 10), *sec.* 6.

Sec. 72 of the *Goods Act* 1915 (Vict.) provides that "Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped shall be in all civil proceedings conclusive evidence of such shipment against the master or other person signing the same notwithstanding that such goods or some part thereof were not so shipped;" &c.

Held, that the section operates only against the person who has actually signed a bill of lading or the person in whose name and with whose authority it has been signed, and does not make a bill of lading which has been signed by the agent of the shipowner in his own name conclusive evidence against the shipowner.

Valieri v. *Boyland*, (1866) L.R. 1 C.P., 382, and *Brown* v. *Powell Duffryn Steam Coal Co.*, (1875) L.R. 10 C.P., 562, followed.

Held, also, that, where a ship is owned by several persons of whom one is managing owner, the latter has, apart from express authority, no power to bind the other owners by signing a bill of lading for goods which have not been shipped, nor can his signature to the bill of lading be regarded as theirs so as to bind them conclusively by the statements therein that the goods were shipped.

Held, further, that an action *in rem* under sec. 6 of the *Admiralty Court Act* 1861 will not lie against a ship unless there would be a right *in personam* against the owners.

Owners of SS. Utopia v. *Owners of SS. Primula—The Utopia*, (1893) A.C., 492, at p. 499, followed.

The Emilien Marie, (1875) 32 L.T., 435, distinguished.

Held, also, that apart from the *Goods Act* the owners of a ship are not estopped from denying the truth of the statements in a bill of lading for goods not in fact shipped which is signed by the managing owner without authority to do so and upon which the consignee has acted.

Grant v. *Norway*, (1851) 10 C.B., 665, followed.

A bill of lading, which stated that a certain quantity of timber had been shipped on a ship owned by several persons, was signed by the managing owner in his own name, describing himself as such. On or before the arrival of the ship in Melbourne the plaintiff paid the amount of the draft for the agreed price, and received the indorsed bill of lading. Part of the timber stated in the bill of lading to have been shipped was not in fact shipped. In an action in the High Court in Admiralty by the plaintiff against the ship for failure to deliver that part of the timber,

Held, that the plaintiff was not entitled to recover.

HEARING of action.

An action was brought in the High Court in its Admiralty Jurisdiction, by Rosenfeld Hillas & Co. Proprietary Ltd. against the ship Fort Laramie, in which by the writ the plaintiff, as consignee and/or assignee of two bills of lading of goods carried to the Port of Melbourne by the defendant ship, claimed the sum of £3,046 9s. 11d. for breach of duty and/or breach of contract on the part of the owners and of the master of such ship, alleging that at the time of the institution of the action no owner or part-owner of the ship was domiciled in Australia. The particulars stated that the breach consisted of failure to deliver certain specified timber.

The material facts are stated hereunder in the judgment of *Knox* C.J., by whom the action was heard.

H. I. Cohen K.C. and *Claude Robertson*, for the plaintiff.

Pigott, for the defendant.

Cur. adv. vult.

June 1.

KNOX C.J. delivered the following written judgment:—The plaintiff, as indorsee of two bills of lading given in respect of certain timber therein stated to have been shipped on the defendant ship, claimed to recover in this action £3,046 9s. 11d. as damages for the

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failure to deliver portion of such timber. The ship having been arrested, security was given; and she was thereupon released. In June 1921 the action came on for hearing before me *ex parte*, and, on the evidence then given, judgment was entered for the plaintiff for £2,549 7s. 9d. and costs of action. The defendant subsequently applied to set aside the judgment; and on 31st August 1921 I ordered that the judgment be set aside on certain terms, of which the following are all that need now be stated, viz., (1) the amount for which judgment was entered, with interest at 6 per cent. from date of trial to date of payment, to be paid into Court within twenty-one days and to be paid out to the plaintiff upon its giving security to the satisfaction of the Registrar for repayment in the event of the defendant ultimately succeeding in the action; (2) the costs already paid to the plaintiff to be retained by it in any event; (4) the defendant undertakes to abide by any order the Court or a Justice may make as to the costs of the action, including the cost to the plaintiff of obtaining the necessary securities for repayment of the amount of the judgment; (5) the defendant to give security to the satisfaction of the Registrar in the sum of £500 for the due performance of the above-mentioned undertaking; (7) the writ to be redelivered within three days amended to accord with claim as made at trial. The amount of the judgment was paid to the plaintiff upon security being given in accordance with the order, and the writ was amended by reducing the amount claimed to £2,549 7s. 9d. and by striking out so much of the claim as related to certain door stock. Evidence having been taken on commission in San Francisco, the action again came on for hearing before me. The grounds of defence relied on were "(1) that the timber claimed for was not shipped; (2) alternatively, that such timber was delivered in Melbourne in accordance with the bills of lading." No argument was addressed to me in support of the remaining grounds of defence of which notice had been given.

Both bills of lading were signed by W. S. Scammell as managing owner, and each covered specified numbers of pieces of timber as shipped "on deck" and as shipped "under deck" respectively. The claim in this action is only in respect of the timber said to have been shipped "under deck."

It appears from the evidence that the ship was loaded at San

Francisco. The under-deck cargo and part of the on-deck cargo were put on board at the Municipal Dock and the balance of the on-deck cargo at the Parr Terminal Dock. When the hold was full the hatch was put on, battened down in the usual way and cemented. The deck cargo was then stowed, and when completed the whole deck of the ship including the hatch was covered with timber to a depth of 9 or 10 feet. Portion of the cargo both on-deck and under-deck was destined for persons other than the plaintiff. The bills of lading on which the plaintiff sues specified 33,457 pieces of timber said to contain 802,293 feet as shipped under deck. On the voyage a quantity of the timber stowed on deck was jettisoned, but when the ship arrived in Melbourne the hatch and deck were still covered with the remainder of the deck cargo to a depth of 2 or 3 feet. When this timber had been discharged the hatch was inspected by a marine surveyor, who found it battened down, covered with tarpaulin and cemented. There is evidence that none of the under-deck cargo was jettisoned. The ship came direct from San Francisco to Melbourne, not calling at any port on the way.

When the deck cargo had been discharged in Melbourne it was kept separate and distinct from the timber afterwards discharged from under deck. The under-deck cargo was discharged in the usual way, and the evidence shows clearly that no timber was left in the hold. There is no evidence from which it can be inferred that any of the timber discharged from under deck was stolen or lost, or that any person other than the plaintiff received any timber answering to the marks or descriptions specified in the plaintiff's bills of lading. It is not disputed that the plaintiff received less than the number of pieces specified in the bills of lading as having been shipped under deck, and I am satisfied that the deficiency amounted to 2,077 pieces, containing approximately 46,644 feet, worth at that time £2,085.

On or before the arrival of the ship in Melbourne, the plaintiff paid the amount of the draft for the agreed price c.i.f. of the timber and received the indorsed bills of lading, to which had been attached the draft. The rules of law applicable to the case are clearly stated by *Greer* J. in *Sanday* v. *Strath Steamship Co.* (1), and his statement

(1) (1920) 26 Com. Cas., 163.

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was approved by the Court of Appeal in the same case (1). At page 167 he says :—"(1) A plaintiff claiming damages for short delivery must, like any other claimant, prove his case. (2) It is sufficient to entitle the plaintiff to succeed if he proves the delivery of a less number or weight or measure of goods than that which is admitted in the bill of lading. This proof puts the onus on the shipowner to establish that the number, weight, or measure admitted by the bill of lading is wrong. (3) He may do so by direct evidence showing that a mistake was made by the tallymen from whose tallies the bill of lading was made out. (4) He may do so by indirect evidence sufficient to satisfy the tribunal of fact beyond reasonable doubt that none of the goods were lost or stolen after receipt, and that he delivered all he received."

In the present case no tally was made of the timber stowed under deck. The numbers of pieces of this cargo stated in the bills of lading appear to have been made up by deducting from the numbers of pieces of the several classes of timber shown in the invoices of the millowners who supplied the timber for shipment the numbers ascertained by a tally to have been stowed on deck. The numbers of pieces of the on-deck cargo stated on the bills of lading substantially correspond with the tallies taken when this portion of the cargo was in course of being stowed on the ship. There is, therefore, no direct evidence—apart from the admission contained in the bills of lading—of the numbers of pieces actually stowed under deck. But the evidence of the marine surveyor, which was not contradicted or challenged, as to the condition of the hatch and as to the timber on deck when the ship arrived in Melbourne, coupled with the evidence given on commission as to the closing of the hatch in San Francisco when the hold was full, satisfies me beyond reasonable doubt that no portion of the under-deck cargo was jettisoned or was lost or stolen after it was loaded and before the hatch was opened in Melbourne.

It was suggested in argument for the plaintiff that the missing pieces of timber might have been lost or stolen in Melbourne while the ship was discharging cargo; but, having regard to the nature of the cargo, to the evidence given as to the tallying of the timber discharged, particularly the evidence of Slattery, the tally-clerk who was

(1) (1921) 26 Com. Cas., 277.

employed on behalf of the plaintiff, that he got all the timber belonging to the plaintiff that was below deck, and to the absence of any evidence direct or indirect tending to support the suggestion, I am forced to conclude that the pieces of timber short delivered were not put on board the ship in San Francisco. On the evidence, therefore, I find that the defendant had discharged the onus of proving that the numbers of pieces of under-deck cargo admitted by the bills of lading are wrong.

But it was argued by counsel for the plaintiff that the effect of sec. 72 of the *Goods Act* 1915 was to make the bills of lading sued on conclusive evidence in this action of the shipment of the numbers of pieces of timber thereby represented to have been shipped, notwithstanding that some of them were not so shipped. It has been decided that the section operates only against the person who has actually signed a bill of lading or the person in whose name and with whose authority it has been signed (*Valieri* v. *Boyland* (1)), and that it does not make a bill of lading which has been signed by the agent of the shipowner in his own name conclusive evidence against the shipowner (*Brown* v. *Powell Duffryn Steam Coal Co.* (2)). The signature of a bill of lading by the master in his own name as master does not estop the shipowner from disputing the correctness of the bill of lading. In this case the bills of lading were signed by "W. S. Scammell, managing owner." The evidence establishes that on 24th and 26th November 1920 W. S. Scammell who signed them was managing owner of the defendant ship, and that the registered owners were James Jerome and W. S. Scammell, 45/64; M. Thompson & Co., 16/64; Mrs. Ruby Osborn, 3/64.

From the decision in *Brown* v. *Powell Duffryn Steam Coal Co.* (3) it would seem to follow that in these circumstances Scammell is the only person against whom the bills of lading are conclusive evidence of the truth of the representations as to the quantity of timber shipped. But there is a further question whether Scammell had authority to sign and issue bills of lading for cargo not actually shipped. There is no evidence of any express authority to this effect from the owners to Scammell, and his power to bind them by

(1) (1866) L.R. 1 C.P., 382. (2) (1875) L.R. 10 C.P., 562, at p. 568.
(3) (1875) L.R. 10 C.P., 562.

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contract or by admission must depend on the recognized extent of the authority of a managing owner where no special agreement exists. In the absence of evidence to the contrary, I think it must be assumed that all the owners of the ship concurred in his appointment, and authorized him to do on their behalf all such acts as are usually done by the managing owner of a ship. The powers of a managing owner are stated in *Carver on Carriage by Sea*, 6th ed., par. 36, as follows: —"The business of a ship having several owners is ordinarily conducted by a managing owner, or a ship's husband, appointed by the owners for the purpose. He bears their authority, and acts as their general agent to do all the ordinary business of the ship. Thus, usually, he is empowered to make any such contracts for carrying goods in the ship, or for letting her, as are consistent with her ordinary employment; and to do what else may be 'necessary to enable the ship to prosecute her voyage and earn freight.' And the contracts so made are generally binding on all the part-owners personally. But a managing owner's authority, as general agent for the owners, is limited to contracts which are reasonably needful for carrying on the ordinary business of the ship. He cannot, for example, validly engage her for an unusually long period in advance, and thus take the control of her out of the owner's hands. And the extent of his authority may be a question of fact, to be determined upon the particular circumstances. He may in truth be acting for some of the part-owners only. And those for whom he does act may show that he was not empowered to make the particular contract on their behalf; unless by their course of business, or in some other way, they have held him out as having that power."

The power of a managing owner to bind the other owners of a ship by a bill of lading issued by him must therefore be limited by the scope of his authority to issue bills of lading, and in my opinion he has, apart from express authority, no more power than the master of a ship to issue a bill of lading for goods which have not been shipped. It follows that the other owners of the defendant ship are not bound by these bills of lading so far as they relate to timber which was not actually shipped, and that no action would lie against them personally either on the contract of carriage or on the bill of lading regarded as a document of title to the goods. If Scammell

had no authority to bind them by the bills of lading as to timber not shipped, it follows also that his signature to the bills of lading cannot be regarded as theirs, and that they are not conclusively bound by the statements thereon as to the amount of timber shipped. This point is covered by the dictum of *Bramwell* B. in *Jessel* v. *Bath* (1).

It was, however, argued that, even if the statements in the bills of lading would not be conclusive against the other owners in an action *in personam* against them, they might still be conclusive in an action *in rem* against the ship because Scammell was himself one of the owners. This argument must fail unless an action *in rem* will lie against a ship in a case in which there would be no right of action *in personam* against the owners. It has never been decided whether such an action will lie; and on principle it appears to me that it will not. The *Admiralty Court Act* 1861 provides for proceedings *in rem* in respect of any claim by the owner or consignee or assignee of any bill of lading for damage to or failure to deliver goods due to breach of duty or breach of contract on the part of the owner, master or crew of the ship. *Primâ facie* a part-owner is not "the owner" of the ship. On the assumption that Scammell had not authority to bind his co-owners by the bills of lading in respect of the timber not shipped, there was no contract or duty existing between them and the consignees or assignees of the bills of lading of such timber, and there could therefore be no breach of contract or breach of duty on their part. The question is discussed in *Carver on Carriage by Sea*, 6th ed., par. 696; and the opinion there expressed that an action *in rem* cannot be maintained where there is no cause of action against the owners appears to me to be supported by the following passage from the judgment of the Privy Council in *Owners of SS. Utopia* v. *Owners of SS. Primula—The Utopia* (2):—"It was suggested in argument that, as the action . . . is an action *in rem*, the ship may be held liable, though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law now well recognized." See also *The Castlegate* (3). For these reasons I am of opinion that neither the ship, nor the owners other than Scammell, were conclusively bound by the statements in the bills of lading.

(1) (1867) L.R. 2 Ex., 267, at p. 274. (2) (1893) A.C., 492, at p. 499.
(3) (1893) A.C., 38.

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At first sight the decision of *Phillimore* J. in *The Emilien Marie* (1) appears to be opposed to this conclusion, but when that case is examined it is clear that it is no authority for the general proposition that an action *in rem* can be maintained against a ship where there is no cause of action against some of the part-owners. The decision was not based on the proposition that because a part-owner had given a bill of lading for goods not shipped the ship was liable for non-delivery. In fact the bill of lading sued on in that case contained the words "weight unknown," and the substantial defence set up was that the holders of the bill of lading were only entitled to so much as was left of a bulk cargo after delivery of the quantities named in other bills of lading which contained similar words.

Mr. *Cohen* for the plaintiff also urged that apart from the provisions of the *Goods Act* the defendant was estopped from denying the truth of the statements in the bills of lading on which the plaintiff had acted. On the footing that Scammell had no authority to issue bills of lading for goods not shipped, this point is covered by the decision in *Grant* v. *Norway* (2).

The result is that, the defendant being at liberty to show that the pieces of timber in respect of which the plaintiff claims were not in fact shipped, though stated by the bills of lading to have been shipped, and having established that fact to the satisfaction of this Court, the plaintiff fails, and must repay to the defendant the amount received by him under the order of 31st August 1921.

The only remaining question is as to the costs of this action. The defendant has undertaken, as a condition of obtaining the order setting aside the judgment, to abide by any order that may be made as to the costs of the action. The plaintiff has been paid and will retain the costs to which it was entitled under the former judgment and its costs of the application to set aside that judgment. The litigation has been caused by the errors in the bills of lading, and these are due to the negligence of the managing owner or of the charterers of the defendant in omitting to take proper steps to ensure that bills of lading were given only for cargo actually loaded on the ship. In consequence of the slipshod methods adopted, the plaintiff has paid some £2,500 as the price of timber which it has not received,

(1) (1875) 32 L.T., 435. (2) (1851) 10 C.B., 665.

and, even if this amount can ultimately be recovered, its recovery will probably involve the plaintiff in considerable trouble and expense. Moreover, the owners or charterers of the defendant ship have been paid a considerable sum by way of freight in excess of the amount payable on the timber actually shipped and carried under deck, and they have persisted until the present time in asserting that the timber in question was actually shipped. Possibly their object in doing so was to throw the liability for the plaintiff's loss on to the insurers of the under-deck cargo. On the other hand, the plaintiff has failed in this action, but it may fairly claim to have been misled by the persistent assertion of the shipowners that the timber had been shipped.

In these circumstances I think it is proper to order that each party pay its own costs.

Judgment for the defendant. Plaintiff to repay to the defendant the sum of £2,549 7*s.* 9*d. with interest thereon at* 6 *per cent. per annum from* 28*th September* 1921 *to date of payment.*

Solicitors for the plaintiff, *Cohen & Herman.*

Solicitors for the defendant, *Blake & Riggall.*

B. L.