[HIGH COURT OF AUSTRALIA.]

ROSENFELD HILLAS & COMPANY PROPRIETARY LIMITED. . . . . Appellant;
Plaintiff,

AND

THE SHIP FORT LARAMIE . . . Respondent.
Defendant,

ON APPEAL FROM THE HIGH COURT (KNOX C.J.) IN ADMIRALTY.

H. C. OF A. 1923.

MELBOURNE, *Feb.* 12, 13, 14; *Mar.* 23.

Isaacs, Higgins and Starke JJ.

Ship—Carriage of goods—Bill of lading—How far conclusive evidence of shipment of goods—Bill of lading signed by managing owner—Liability of other owners—Estoppel—Action in rem—Evidence to disprove shipment of goods mentioned in bill of lading—Goods Act 1915 (*Vict.*) (*No.* 2663), *sec.* 72.

In an action in Admiralty by the indorsee of a bill of lading against a ship for failure to deliver certain goods specified in the bill of lading as shipped, the bill of lading is not conclusive evidence that the goods were shipped.

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

But (*per Isaacs* and *Higgins* JJ.) to displace the evidence of shipment afforded by the bill of lading, the fact of non-shipment must, where that fact is relied on, be established by evidence which is clear, distinct and convincing; (*per Starke* J.) an unqualified bill of lading is prima facie evidence that the goods were shipped, and the burden of disproving it lies on the owner of the ship.

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. In an action in the High Court in Admiralty by the indorsee of the bill of lading against the ship for failure to deliver a certain part of the timber, stated in the bill of lading to have been shipped, affirmative evidence was given by the defendant which supported the statement in the bill of lading, but one of the defences relied on at the trial was that the timber in question had not been shipped.

Held, on the facts, that the plaintiff was entitled to judgment.

H. C. OF A. 1923.

ROSENFELD HILLAS & CO. PTY. LTD. v. THE FORT LARAMIE.

Per Isaacs J. :—(1) In relation to the execution and legal effect of a bill of lading there is no reason why the implied authority of a managing owner to bind the owners by an inaccurate statement as to the receipt of goods shipped should be greater than that of the master. (2) Unless the holder of a bill of lading can prove an actual authority from the owners, greater than the apparent authority of the managing owner, such holder cannot assert an authority larger than an authority to conduct the business in the usual manner; and the usual manner is to give a receipt for goods shipped only after they are in fact shipped. (3) If the goods have not in fact been shipped, any receipt for them given by the managing owner is given beyond the scope of his implied authority, and, in the absence of proof of actual authority, his co-owners, unless otherwise estopped, are not bound.

Decision of *Knox* C.J. : *Rosenfeld Hillas & Co. Proprietary Ltd.* v. *The Ship Fort Laramie*, (1922) 31 C.L.R., 56, reversed on the facts.

APPEAL from *Knox* C.J.

An action was brought in the High Court in its Admiralty Jurisdiction by Rosenfeld Hillas & Co. Proprietary Ltd. against *The Ship Fort Laramie*, and therein, by the writ as amended, 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 £2,549 7s. 9d. 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 Victoria. The amended particulars assigned the following particulars of breach :—Failure to deliver the undermentioned goods at the prices undermentioned : 2,077 pieces of redwood averaging 22·457 feet, equal to 46,644 feet, at £49 13s. 9d. per 1,000 feet, £2,317 12s. 6d. ; plus 10 per cent., £231 15s. 3d. : £2,549 7s. 9d.

The action originally came on for hearing in June 1921, before *Knox* C.J., *ex parte*, and judgment was entered for the plaintiff for £2,549 7s. 9d. and costs of action. Afterwards, on 31st August 1921, on the defendant's application, this judgment was set aside on the terms set out in the judgment of *Knox* C.J. (1). These terms included liberty to amend the writ so as to accord with the claim as made at the trial. The writ was amended accordingly.

Evidence having been taken on commission in San Francisco, the action again came on for hearing before *Knox* C.J. The grounds of

(1) (1922) 31 C.L.R., at p. 58.

defence relied on were (1) that the timber claimed for was not shipped, and (2) alternatively, that such timber was delivered in Melbourne in accordance with the bills of lading. Other grounds of defence of which notice had been given were not supported by argument.

His Honor found that the timber in respect of which the plaintiff claimed, though stated by the bills of lading to have been shipped, was not in fact shipped, and accordingly gave judgment for the defendant and ordered the plaintiff to repay to the defendant the amount received by the plaintiff under the order of 31st August 1921: *Rosenfeld Hillas & Co. Proprietary Ltd.* v. *The Ship Fort Laramie* (1).

From that judgment the plaintiff now appealed to the High Court on the following grounds :—

(1) That the learned Chief Justice was wrong in holding (a) that the timber (the subject-matter of the action) was not in fact shipped on the said ship at San Francisco ; (b) that the respondent was not—in favour of the said appellant as indorsee of such bills of lading for valuable consideration or otherwise—estopped either at common law or by virtue of sec. 72 of the *Goods Act* 1915 (Vict.) from proving that the said timber (represented by the relevant bills of lading to have been shipped) was not so shipped ; (c) that one Walter S. Scammell, the managing owner of the said ship, was not in fact authorized to sign and issue the said bills of lading, and/or that his signature thereto did not conclusively bind all the owners of the said ship, and /or the ship, in favour of the said appellant as such indorsee or otherwise.

(2) That the owners of the said ship had by their acts and conduct ratified the acts and signature of the said Walter S. Scammell to and in relation to the said bills of lading.

(3) That the respondent did not discharge the onus upon it of establishing that the admission of the shipment of the said timber in the said bills of lading was wrong.

(4) (Alternatively) that there was direct evidence before the learned Chief Justice that the said timber was " received " by and /or put on board the said ship in San Francisco.

(1) (1922) 31 C.L.R., 56.

H. C. OF A. 1923.

ROSENFELD HILLAS & CO. PTY. LTD. v. THE FORT LARAMIE.

(5) That the respondent did not call or tender any evidence in America or at the trial to contradict the admission contained in the said bills of lading as to the timber being shipped.

(6) That the said judgment was against the evidence and the weight of evidence and was otherwise bad in law.

(7) That the learned Chief Justice was wrong in holding that on the facts an action *in rem* did not lie against the respondent.

(8) That judgment should have been given for the plaintiff for the amount claimed with costs.

(9) That the learned Chief Justice was wrong in allowing the respondent interest on the sum of £2,590 9s. 3d. from 28th September 1922 until judgment or payment.

(10) That the learned Chief Justice should have allowed the plaintiff its costs of the action (including the cost of the plaintiff of obtaining the necessary securities for repayment of the amount of the judgment in the first action) and/or to retain the amount of such costs.

H. I. Cohen K.C. and *Claude Robertson*, for the appellant. The evidence shows that the timber here in question was shipped as set out in the bills of lading, and that such of it as is described in those documents as "on deck" was shipped on deck, and that such as is therein described as "under deck" was shipped under deck. The fact that on the discharge of cargo from the ship some timber was missed or missing is as consistent with theft or loss after discharge as with the supposition that it had never been shipped. The fact of original non-shipment must be proved by clear and convincing evidence, and must not be left to a balancing of probabilities. The case of *Grant* v. *Norway* (1) imposes a limit on the authority of a master, but does not impose the same limit on that of a managing owner who (as here) has signed a bill of lading. Where co-owners entrust to one of their number the duty of signing bills of lading the co-owners are bound by everything contained in the document so signed by the managing owner. If the goods were put on board, the representations of the managing owner contained in the bill of lading estop the other owners. The owners are estopped as to all

(1) (1851) 10 C.B., 665.

representations in the bill of lading. Sec. 72 of the *Goods Act* 1915 (Vict.) applies to this case.

Pigott, for the respondent. The owners may show that the goods were not shipped. The evidence adduced on their behalf shows that the timber here in question was not shipped. The signature of the managing owner does not bind the other owners, except prima facie, and they may show, as they have shown, that the timber was not shipped in fact. Whatever was in the hold was unloaded at Melbourne. The point that an action *in rem* does not lie is not pressed.

[The following cases also were referred to during argument: *The Emilien Marie* (1); *The Dupleix* (2); *The Huntsman* (3); *Cox* v. *Bruce* (4); *Smith & Co.* v. *Bedouin Steam Navigation Co.* (5); *Hogarth Shipping Co.* v. *Blyth, Greene, Jourdain & Co.* (6).]

Cur. adv. vult.

Mar. 23.

The following written judgments were delivered:—

ISAACS J. This is a suit in Admiralty by the appellant Company as the indorsees of two bills of lading against *The Ship Fort Laramie* for failure to deliver certain timber specified as shipped under deck. An unconditional appearance was entered in the name of "The Ship." In the event, it has become unnecessary to consider how far, notwithstanding the form of the appearance and the provisions of the rules as to appearance, the doctrine of *The Dupleix* (2) should be applied.

The ship is an American ship registered in San Francisco; and the owners are James Jerome and W. S. Scammell, holding $\frac{45}{64}$ths, M. Thompson & Co., holding $\frac{16}{64}$ths, and Mrs. Ruby Osborn, holding $\frac{3}{64}$ths. The bills of lading were issued to J. J. Moore & Co., shipping merchants, importers and exporters of San Francisco, and were signed "W. S. Scammell, managing owner," on 24th and 26th November 1920 respectively. The first of them specified as "shipped," in addition to timber "on deck," the following:

(1) (1875) 32 L.T., 435.
(2) (1912) P., 8.
(3) (1894) P., 214.
(4) (1886) 18 Q.B.D., 147.
(5) (1896) A.C., 70.
(6) (1917) 2 K.B., 534.

H. C. OF A. 1923.

ROSENFELD HILLAS & CO. PTY. LTD. v. THE FORT LARAMIE.

Isaacs J.

"Under deck—no mark—30,314 pieces rough clear redwood lumber said to contain 743,919 feet board measure, 952 pieces seasoned rough clear redwood lumber said to contain 8,152 feet board measure, and 4,334 bundles seasoned rough clear redwood doorstock containing 5 pieces each and said to measure 59,248 feet board measure." The second bill of lading specified as "shipped," in addition to timber "on deck," the following: "Under deck—no mark—1,974 pieces green clear redwood lumber said to contain 47,166 feet board measurement and 217 pieces seasoned clear redwood lumber said to contain 3,056 feet board measurement." The timber claimed for is 2,077 pieces of the timber specified as shipped "under deck," except the 4,334 bundles, and the quantity claimed as undelivered is 46,644 feet.

At the trial before the learned Chief Justice, the grounds of defence relied on were two, namely, (1) that the timber claimed for was not shipped, and (2) alternatively, that it was delivered. Other grounds of defence notified were not argued. The Chief Justice found as a fact that the timber in question was not shipped, and on that ground gave judgment for the defendant. His Honor had before him uncontroverted evidence that only the "on-deck" cargo was actually tallied in the *Fort Laramie* itself, and that the specified "under-deck" cargo was arrived at by stating the balance after deducting from the total tallies in two other vessels from which the timber was transhipped to the *Fort Laramie* the on-deck cargo of the latter vessel as actually tallied. He had also before him evidence by the master of the *Fort Laramie* that "when the hold was full" (that is at San Francisco) "the hatches were put on, cemented and battened down," and evidence that on arrival at Melbourne the hatches were still cemented, and evidence as to the delivery to the plaintiff of the "under-deck" timber belonging to it. The plaintiff's main reliance at the trial and before us was on the legal effect of the bills of lading, it being contended that they were conclusive on all the owners. Next, failing conclusiveness, reliance was placed on the suggestion that the missing timber might have been lost or stolen in Melbourne while the ship was discharging cargo, as sufficient to prevent the direct evidence above mentioned from overcoming the prima facie effect of the bill of lading. No

reference was made to certain certificates of actual tallies of the two vessels (the *Mayfair* and the *Charles Nelson*) from which the timber was transferred to the *Fort Laramie*, or the table of calculations made by Adams, who, acting for Moore & Co., superintended the transfer and rearranged the timber supplied in the two feeding vessels by the Redwood Lumber Co. to Moore & Co., and supplied by the latter firm to various Australian destinations. Nor does it seem at all probable that due weight was placed by the appellant upon an affidavit made by W. S. Scammell, the managing owner, on behalf of the defendant ship, in answer to interrogatories. Had these documents been forcibly pressed upon his Honor's attention, there seems no reason to doubt that he would have viewed the matter as we view it, and that the learned counsel for the defendant ship would have then, as now, admitted the unanswerable cogency of the evidence. Those documents are very important also for another reason, to be presently mentioned.

It is desirable, at the outset, to refer to the contentions advanced on behalf of the appellant with respect to the conclusiveness of the bills of lading. They were signed as already stated, not by the master but by W. S. Scammell, "managing owner." It was urged that the owners were estopped as against the appellant, an indorsee for value, from disputing the accuracy of the bills of lading, and that no further evidence was necessary. The argument went so far as to challenge the correctness of *Grant* v. *Norway* (1) in limiting the implied authority of the master as general agent to the "usual" course of business. It was also said that at all events no case so far had limited the implied authority of a managing owner so strictly as *Grant* v. *Norway* had limited that of a master. And on general principles it was contended that owners entrusting one of their number with the duty of signing bills of lading as managing owner should be held bound by whatever the document contains.

I am unable to agree with any of these views. A bill of lading is a very ancient document, and has come down with characteristics that are now well acknowledged. Its very form, when carefully read, indicates its nature. It is, in the first place, an acknowledgment and receipt. It acknowledges that there have been already

(1) (1851) 10 C.B., 665.

H. C. OF A. 1923.

ROSENFELD HILLAS & CO. PTY. LTD. v. THE FORT LARAMIE.

Isaacs J.

"shipped" certain goods, which are described. So far it is a receipt. In some cases statements may be added—statements which amount to representations as to the condition of those goods. Then it proceeds to state the terms on which they have been received, and as to this part it is a contract (see sec. 71 of the *Goods Act* 1915 (Vict.)). And in any action for non-delivery it was always open to the shipowner to prove, if he could, that in fact the goods were not shipped, notwithstanding the statement in the bill of lading that they were. This prima facie but rebuttable evidentiary character of the receipt statements in the bill of lading continues to the present day except where expressly altered by statute. *Grant* v. *Norway* (1) is not to be questioned where it is the master who signs the bill of lading. To see how far that extends to the case of a managing owner, the groundwork of the decision must be looked at. The legal foundation for the statement being rebuttable where the master signs is in the nature of general agency so far as it rests on implication (see *Grant* v. *Norway* (2)). Every general agent to conduct a given business, is, in the absence of greater express power, bound to conduct it for his principals in the usual manner (*Wiltshire* v. *Sims* (3)). This doctrine is specifically applied to a managing owner in *The Huntsman* (4). This is not meant to determine that the powers of a managing owner as such do not extend beyond those of a master as such; but in relation to the execution and legal effect of a bill of lading there is no reason why the implied authority of a managing owner to bind the owners by an inaccurate statement as to the receipt of goods shipped should be greater than that of the master. Consequently, unless a bill of lading holder can prove an actual authority from the owners greater than the apparent authority implied from the position in which he finds the managing owner—for instance, an actual authority to issue a conclusive receipt—he cannot assert an authority larger than that of conducting the business in the usual manner. And, as the usual manner is to give a receipt for goods shipped only after they are in fact shipped, it follows that, unless goods have been in fact shipped, any receipt for them has been given beyond the scope of the managing

(1) (1851) 10 C.B., 665.
(2) (1851) 10 C.B., at p. 687.
(3) (1808) 1 Camp., 258.
(4) (1894) P., at p. 218.

owner's implied authority, and in that case his co-owners, unless otherwise estopped, are not bound unless sufficient actual authority is proved. The final test of the liability of the co-owners is not whether the goods have been put on board: that is only an instance of whether the final test is or is not satisfied. The final test is whether the bill of lading has been given within the scope of the managing owner's implied authority, that is, in the usual course of business. The position is very clearly stated in *Cox* v. *Bruce* (1) by Lord *Esher* M.R., where he refers to and explains the principle of *Grant* v. *Norway* (2). A general agent may qualify the receipt in such a way as to deprive it of the character of a clean bill of lading and to prevent it from being even prima facie evidence against the shipowner. In one respect that has happened here, as will presently be shown. Apart from that for the moment, it should be observed that, though the non-conclusive character at common law of the receipt in a bill of lading given within the scope of general authority has been preserved, leaving open to the shipowner an avenue of escape if he can show that in fact the goods were not shipped, the exigencies of mercantile business and the necessity of protecting innocent indorsees for value acting on the faith of a clean bill of lading have led to the establishment of a very strict rule of evidence to which the shipowner must conform. He has the responsibility of morally convincing the tribunal of the fact that notwithstanding his unqualified written statement an error has been made and that the goods were not shipped. A Court in such a case refuses to act on a mere balance of probabilities; the evidence of exoneration must be clear and distinct and convincing; it must exclude beyond reasonable doubt the possibility of the goods having been shipped. The common law compels the indorsee of a bill of lading to take the risk of a possible error, but places on the person who by himself or his agent is, to some extent at least, responsible for the error, the heavy burden of demonstrating it. Thus the strict law and the practical demands of mercantile justice are adjusted.

Whether in a given case the shipowner has discharged the burden depends entirely on the circumstances of the case, and no more definite guide can be given than to apply the principle to the facts

(1) (1886) 18 Q.B.D., at pp. 151-152. (2) (1851) 10 C.B., 665.

H. C. OF A. 1923.

ROSENFELD HILLAS & CO. PTY. LTD. v. THE FORT LARAMIE.

Isaacs J.

of each case as it arises. The guiding principles have been clearly and authoritatively laid down by the House of Lords in *Smith & Co.* v. *Bedouin Steam Navigation Co.* (1), and recently reaffirmed by that tribunal in *Hain* v. *Herdman* (19th May 1922). The statutory provision relied on—which in this instance is the Victorian *Goods Act* 1915, sec. 72, made applicable by sec. 79 of the *Judiciary Act* as a rule of evidence—does not on the present facts affect the owners other than Scammell himself (*Thorman* v. *Burt, Boulton & Co.* (2)).

It is unnecessary, in view of the final attitude of the respondent, to say how far that enactment would attach liability in this case to Scammell. Now, the bills of lading here are " clean " bills of lading, with one exception. They are clean bills of lading as to the *number* of the pieces of timbers shipped of the designated character, but they are not clean bills of lading as to the *foot measurements* of those pieces. The shipowners are protected as to measurements by the words " said to contain " so many feet. (See that phrase referred to in *Parsons' Maritime Law*, vol. I., p. 143.) A distinct unqualified statement as to quantity was therefore not made ; and consequently, even calling in aid as against all the owners the provisions of the statute—the *Goods Act* 1915 (Vict.), sec. 72—it would not avail as to the measurements : a gap thus arises which it requires affirmative evidence to fill before the appellant can succeed. This is so because in face of the qualification the bills of lading are not even prima facie evidence of the measurements (*Jessel* v. *Bath* (3), *Hogarth Shipping Co.* v. *Blyth, Greene, Jourdain & Co.* (4) and *Craig Line Steamship Co.* v. *North British Storage and Transit Co.* (5)). Leaving aside for the moment the question of foot measurements, it is important, when the Court is considering whether it ought to be convinced of the non-shipment of the goods, to observe that the attitude of the respondent has been to insist that the goods claimed for were duly shipped, and until the trial the real contention of the shipowners was that the goods had probably been jettisoned in consequence of perils of the sea, which under the terms of the bill of

(1) (1896) A.C., 70.
(2) (1886) 54 L.T., 349.
(3) (1867) L.R. 2 Ex., 267.
(4) (1917) 2 K.B., 534.
(5) (1921) S.C., 114.

lading would have exonerated the respondent. Their particulars of defence were really inconsistent as to this. On the commission to San Francisco, the owners adduced a chain of evidence, some of it questionable in point of admissibility as against the appellant, had objection been taken to it, seeking to establish that, from the Lumber Co.'s despatch from San Francisco, the timber in question was duly dealt with, finally finding itself either on the deck or in the hold of the *Fort Laramie*. True, much of the evidence was based on the customary trust reposed on original tallies, but still it indicated the full belief at the time of testifying, just a year afterwards, on the part of all persons concerned that the timber had been actually shipped. The appellant might well on that commission rest satisfied with the unquestioning assurance by the owners' witnesses that the goods were shipped on board the *Fort Laramie* and abstain from seeking more definite direct evidence if even that were procurable. Part of the owners' evidence—namely, the Adams certificate and synopsis relating to timber put on board—established by actual figures the number of pieces and their foot measurements that were brought down in the *Mayfair* and the *Charles Nelson* and believed by all persons engaged in the transportation to have been transhipped to the *Fort Laramie*. Comparison of these figures with the manifest indicates no reason to doubt the accuracy of the bills of lading when it is remembered that the manifest includes timber, white pine or yellow pine and some consignment timber for which no bills of lading or certificates are put in evidence. On the other hand, the synopsis sheet part of exhibit No. 11 strongly supports one bill of lading, and the certificates and tallies in exhibit No. 9 support the other bill of lading, as well in measurements as in number of pieces. Notwithstanding these potent figures, all adduced by the respondent itself, Mr. *Pigott* made a valiant effort to show that this all represented mere bona fide but mistaken belief, and urged that the well-meant but erroneous tactics of counsel in San Francisco should not outweigh the actual fact of non-shipment. This, in itself, was a formidable task to undertake. When, however, his attention was drawn to the affidavit made on behalf of the ship by the managing owner himself who had signed the bill of lading, Mr. *Pigott* frankly admitted the impossibility of maintaining his position. That

H. C. OF A. 1923.

ROSENFELD HILLAS & CO. PTY. LTD. v. THE FORT LARAMIE.

Isaacs J.

affidavit, answering an interrogatory as to whether the timber was shipped, setting out the number of pieces and the foot measurement, stated:—"In the schedule in the interrogatory I can identify (a) the first 1,974 pieces and (b) the 217 pieces and (c) the 30,134 pieces and (d) the 952 pieces as having been shipped on the *Fort Laramie* from San Francisco. The timber was shipped 'on deck' and 'under deck' as described in the bills of lading." But the passage quoted is prefaced by the statement that "I have no means of identifying the quantities as to which interrogation is made other than as these are described upon the bills of lading." Reading the question and the answer together, it is an admission that the pieces claimed were actually shipped "under deck" but not of the alleged measurements. The appellant, however, succeeds on the evidence of the figures in exhibit No. 11.

Mr. *Pigott* very fairly stated that, the main fact being established, he consented, in order to avoid all questions of circuity of action, that judgment should be entered generally for the appellant for the value of the goods, £2,085, as found by the Chief Justice, with appropriate provision for refund of moneys already paid to them. In view of this concession, it is unnecessary to consider what the rights of the appellant would otherwise have been on the basis of the principle stated in *The Dupleix* (1). Mr. *Cohen* for the appellant abandoned his claim for a 10 per cent. addition to the value, and assented to the sum of £2,085 being taken as the value of the goods. The proper order in the events that have happened should be that judgment be entered for the appellant for £2,085 with 6 per cent. interest from 14th June 1921 to 20th September 1921, and that the appellant pay into the Court the sum of £464 7s. 9d. with interest at 6 per cent. from 20th September 1921 to the date of payment in, in pursuance of the above order.

The costs of the trial and of this appeal must be paid by the respondent to the appellant because, though the case was not presented as strongly as it might have been to the Chief Justice, yet the facts and figures were all, not only known to the respondents, but actually relied on by them; the costs when taxed to be paid

(1) (1912) P., 8.

pro tanto out of the money to be paid into Court, any balance remaining to be paid out to the respondent.

HIGGINS J. In my opinion, the appeal must be allowed. The principles laid down by the Chief Justice seem to be indisputable; but, owing to the imperfect presentation of the case by the plaintiff, the finding was that the missing timber was not in fact shipped. It is clear that the bill of lading is not conclusive as to the timber shipped; but to displace the evidence afforded by the bill of lading the error therein must be clearly established (*Smith & Co.* v. *Bedouin Steam Navigation Co.* (1)). I cannot doubt that if attention had been called by the plaintiff's counsel to the answers to interrogatories the finding of fact would have been different. These answers made on behalf of the defendant state distinctly that the timber was shipped "on deck" and "under deck" as described in the bills of lading. Moreover, until the case was discussed before us, there was no attempt to demonstrate that which now appears, that the figures as to the timber delivered by the Holmes Eureka Timber Co. to the "feeding vessels," the *Charles Nelson* and the *Mayfair*, correspond with the figures of the timber delivered by the *Fort Laramie*, and with the figures in the bill of lading. There is really nothing, therefore, to negative the possibility that the timber-discharging company in Melbourne overlooked the removal by others of some of the timber consigned to the plaintiff Company.

But for the failure of the plaintiff to present its case properly at the trial, there would have been no need for this appeal; and, if the matter rested with me, I should refuse to the plaintiff appellant its costs of the appeal.

STARKE J. As we are differing from the learned Chief Justice, I shall shortly state, in my own words, the reasons which induce me to uphold the appeal.

An action *in rem* was launched by the plaintiff against *The Ship Fort Laramie* in the original jurisdiction conferred upon this Court in admiralty and maritime matters. The plaintiff's claim was for short delivery of timber specified in two bills of lading as shipped

(1) (1896) A.C., 70.

H. C. OF A. 1923.

ROSENFELD HILLAS & CO. PTY. LTD. v. THE FORT LARAMIE.

Starke J.

under deck. The bills of lading were signed by the managing owner of the ship and were indorsed to the plaintiff. These documents acknowledge that a specified number of pieces of timber "said to contain" a certain number of feet, board measure, were shipped under deck. At the trial the difference between the quantity of timber actually delivered and that specified in the bills of lading was proved, and was not disputed on this appeal. The owners of the ship alleged that the timber representing this difference was not shipped at all, and that the statement to the contrary in the bills of lading did not bind them.

It is unnecessary, in the view I take of the facts, to consider the special position of the managing owner who signed the bills of lading. An unqualified bill of lading is prima facie evidence that the goods were shipped, and the burden of disproving it lies on the owner (*Smith & Co.* v. *Bedouin Steam Navigation Co.* (1); *Scrutton on Charter Parties*, 9th ed., art. 20, pp. 62-63). But here the bills of lading contain a qualification as to the number of feet, board measure, in the pieces of timber shipped under deck, and the burden of proving the measurement of the timber actually shipped therefore rested upon the plaintiff (*New Chinese Antimony Co.* v. *Ocean Steamship Co.* (2)). But the burden of proof is unimportant in this case, for the owners took upon themselves to prove the actual shipment of the timber specified in the bill of lading and also its measurement.

The timber was sent from mills at Eureka by a schooner and barge to San Francisco for loading on the *Fort Laramie*. Mill certificates were put in evidence with specifications attached. The specifications show the number of pieces, the class, and the measurement of the timber tallied into the schooner and barge for transport to the *Fort Laramie*. At San Francisco all this timber, it was sworn, was loaded on the *Fort Laramie*. More than this, the officer whose duty it was to issue the bills of lading explained that he had checked the timber specified in these documents with the mill certificates and specifications. The timber was brought from the mills in four lots. The specifications were laid out and recapitulated with the full amount, and then, to arrive at the under-deck cargo, that on deck was actually tallied and the necessary deduction made

(1) (1896) A.C., 70. (2) (1917) 2 K.B., 664.

accordingly. The witness, upon cross-examination, without any objection being raised, pledged his oath that the timber, specified in the bills of lading so far as the number of pieces, the character and footage, was actually loaded on the ship *Fort Laramie*, that the timber indicated as being under deck was in fact under deck, and that indicated as on deck was on deck. Further, the owners of the ship did not suggest, in the evidence called on their behalf, any want of capacity on the part of the ship to carry the under-deck cargo specified in the bills of lading. Lastly, in an answer to interrogatories delivered in these proceedings, the owners stated that they identified the pieces of timber specified in the bills of lading as having been shipped on the *Fort Laramie* from San Francisco, and that it was shipped on deck and under deck as described in such bills. It is not easy to displace unqualified statements in the bills of lading as to shipment, but, when those statements are supported by evidence led by, and admissions extracted from, the owners, the difficulty of so doing becomes almost insuperable.

The facts which, it is said, displace this strong body of evidence are that when the ship arrived in Melbourne her hatch and deck were covered with deck cargo to a depth of two or three feet, that the hatch when inspected was found to be battened down and covered with tarpaulins and cemented, and that the under-deck cargo was discharged in the usual way, and none was left in the hold of the ship. There was no evidence, as the Chief Justice said, which suggested that the under-deck cargo had been lost, jettisoned, or misdelivered. Now, it seems to me that these facts merely raise a doubt as to shipment; they give no clear explanation, in the face of the bills of lading and the affirmative evidence offered by or extracted from the owners, why the under-deck cargo was not forthcoming.

Under these circumstances, the Court should, in my opinion, act upon the case made by the owners "and refuse to act on mere conjecture or guesswork" as to what happened to the timber. Therefore I concur in the order proposed by my brother *Isaacs*.

The costs must, I think, follow the result, for, though the appellant's counsel omitted at first to present in a clear and coherent form the facts upon which their clients now succeed and addressed

H. C. OF A. 1923.

ROSENFELD HILLAS & CO. PTY. LTD. v. THE FORT LARAMIE.

themselves to many arguments irrelevant and untenable in point of law, still the owners sought to maintain the finding that the timber was not shipped at all, despite the evidence given on their behalf and the admission made by them of the fact of shipment.

Appeal allowed. Judgment for the appellant with costs. Respondent to pay costs of appeal.

Solicitors for the appellant, *Herman & Stretton.*

Solicitors for the respondent, *Blake & Riggall.*

B. L.

[HIGH COURT OF AUSTRALIA.]

ROBERT JOHNSON . . . . . APPELLANT;
PETITIONER,

AND

ELIZABETH ESTHER JOHNSON AND ANOTHER . . . . . RESPONDENTS.
RESPONDENT AND CO-RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1923.

SYDNEY, *April* 17, 18; *May* 3.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Husband and Wife—Divorce—Adultery—Insanity as defence—Evidence—Costs of respondent wife—Guardian ad litem—Costs of appeal to High Court—Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *secs.* 12, 18, 19, 47.

On a petition by a husband against his wife under the *Matrimonial Causes Act* 1899 (N.S.W.) for dissolution of the marriage on the ground of adultery it was proved that, although she suffered from occasional attacks of acute mania, at the time when she had sexual intercourse with the co-respondent she knew the nature of that act, that the co-respondent was not her husband and that the act was opposed to her duty as a wife.

Held, that the wife had been "guilty of adultery" within the meaning of sec. 12 of the Act, and that a decree nisi for dissolution should be made.