OREGON SUPREME COURT DECISIONS

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Adams and Mills v, Carey, Multnomah County.

Decided November 7, 1911.

C. F. Adams and A. L. Mills, respondents, v. F. W. Carey, doing business under the firm name and style of "F. W. Carey and Company," appellant. Appeal from the circuit court for Multnomah county. The Honorable W. N. Gatens, judge. Argued and submitted October 10, 1911. A. B. Winfree (Teal, Minor & Winfree on brief) for respondents. C. H. Carey and Omar C. Spencer (Carey & Keer on brief) for appellant. Bean, J. Reversed.

This is an action to recover $4,500 balance due for services of the tug "Sampson." Upon the trial there was a verdict and judgment of $3,368.45 for plaintiffs, and defendant appeals.

The agreement under which the tug "Sampson" performed towing for defendant is set forth in the complaint as follows:

"This charter party, made and concluded upon in Portland, Oregon, this 29th day of September, 1906, by and between C. F. Adams and A. L. Mills, parties of the first part, owners of the tug Sampson of Portland, Oregon, now lying in the harbor of Portland, and F. W. Carey & Company, of San Francisco, California, parties of the second part, witnesseth:

"1. The said vessel is chartered and let by said parties of the first part to said parties of the second part for a period of two weeks beginning at twelve thirty o'clock a. m. on the morning of the 2d day of October, 1906, for use in towing to and from the Columbia River, Coos Bay and San Francisco, and is to proceed at once to Knappton, Washington, to be ready there to tow a vessel to San Francisco, California, and thereafter is to perform suc hduties in accordance with the terms of this agreement as may be required of her by the said charterers.

"2. The parties of the second part agree to pay and the parties of the first part agree to receive for the use of said vessel the sum of two hundred dollars ($200.00) per day during said period; provided, however, that if during said period said parties of the second part have no active use for said vessel and do not make use of her, a rebate of fifty dollars ($50.00) per day shall be allowed upon said price during the time when she lies idle, no such rebate being allowed, however, for less than a full day, the idle time to be determined by the log of the tug; one thousand dollars ($1000.00) on this charter party to be paid on signing this agreement and the balance on the expiration of the time.

"3. That said vessel shall be tight, staunch, strong and in every way fitted and provided for use as a vessel engaged in the business of towing lumber and other ships from and to ports on the Pacific coast before mentioned.

"4. It is agreed that said vessel shall at all times during the period of this charter be subject to the directions of the parties of the second part and shall go and come between the ports and places before mentioned, and shall tow such vessels as shall be indicated by said second party.

"5. At the end and within said period of this charter, the said vessel shall be returned to Portland, Oregon.

"6. All expenses of fuel, supplies, wages of the crew, and other expenses shall be borne by the parties of the first part and the said parties of the first part shall keep said vessel at all times fully furnished and in good condition to perform the duties as aforesaid.

"7. All risks or damages to tows, cargo, or docks, marine or otherwise, not arising through the negligence of the owners or not covered by insurance on the tug chartered and for which said first parties of said tug would be liable, are hereby expressly assumed that (by) the second parties, and the first parties and the said tug are hereby released and discharged from any and all claims for liability arising or to arise on account thereof, and the second parties agree to hold the said first parties and the said tug harmless therefrom; provided that for any accident to the tug the second parties shall not be liable."

The agreement was signed and sealed on the 29th day of September, 1906.

Plaintiffs allege that pursuant thereto, on the 2d day of October, 1906, plaintiffs delivered to defendant the tug "Sampson" in the required condition, and in all things performed suh agreement on their part. Defendant returned the tug December 11, 1906.

The defendant admits the making of the agreement, and by way of counterclaim pleads:

1. That he lost the use of the vessel for twenty-five days, owing to improper management, and the poor condition of the tug.

2. That he advanced, for the payment of expenses and wages, the amount of $431.55.

3. That, for the period of eleven days, he had no use for the tug, and as provided by the agreement, was entitled to a rebate of $550.00.

4. That on October 2d, the tug did not proceed to Knappton, Washington, where it was agreed she should go, and that he was damaged to the extent of $300.00, demurrage on the tow "Barkentine Northwest" then at Knappton.

5. That by the carelessness and negligence of the plaintiffs, the tug was made to collide with the schooner "Louis" at Knappton, Washington, on November 14th, and again on November 22d, 1906, in the harbor of San Francisco, while the tug "Sampson" was towing the schooner "Louis," the said tug was, by the negligence of the plaintiffs, so carelessly operated that it again fouled and collided with the "Louis," and swung said tow against the "Clan Galbraith," an English vessel then lying at anchor in the harbor. That the "Louis" at that time was, and now is owned and operated by the Simpson Lumber company, a corporation, but was under his care and charge, and he was responsible for her safe towage and delivery at her destination. Both the schooner "Louis" and the "Clan Galbraith" were damaged, and the Simpson Lumber company was compelled to and did pay out on account thereof for repairs to the said vessels, $6769.79, and threatened to and would have libeled the tug "Sampson" for that amount and caused her arrest and sale, thereby depriving defendant of the use of said vessel for a long time to his great damage. In order to prevent the same and protect himself on his liability to the Simpson Lumber company, he was compelled to and did, effect a compromise and settlement with the aforesaid company, in behalf of the tug "Sampson" and its owners, and to protect the tug and the defendant's charter and to pay for such damages of said schooner, upon such settlement, paid to said Simpson Lumber company the sum of $2100.00.

Plaintiffs by their reply admit that defendant did not have the use of the tug for seven days, while it was undergoing repair, and that the log of the tug "Sampson" showed that defendant failed to use said tug for six days, entitling him to a rebate of $50 per day. They admit the $431.55 advanced for supplies and paid to the crew, but deny the alleged damages and deny liability for the damages.

Bean, J. Upon the trial, the court sustained the objection of plaintiffs to the evidence offered by defendant as to the damages paid by defendant to the owners of the schooner "Louis." Upon the part of plaintiffs it is contended that the contract entered into between the parties constituted a demise of the tug "Sampson" to defendant Carey, and made him the owner pro hac vice. On the other hand the defendant contends that the contract was one of towage or affreightment, and therefore the court erred in rejecting the evidence of the claim of defendant for damages caused by the negligence of plaintiffs and their employees. This is the main question in the case, and depends upon the construction of the charter party. There is nothing peculiar or technical in the construction of this kind of contracts. As in all other agreements the intention of the parties is the point to be aimed at. This should be determined from the whole instrument. Primarily, the presumption is against a demise, and that the ownership of a vessel during the period of the charter party continues in the general owner; and unless the intention to transfer the possession and ownership to the charterer is unequivocally manifested by the contract, the charter party will not be treated as a lease or demise of the ship, but will be treated as a contract of affreightment: Grimberg v. Columbia Packers' Assn., 47 Or. 257; 7 Am. Eng. Enc. of Law, 2d ed. 167.

In Marcardier v. Chesapeake Ins. Co., 12 U. S. (8 Cranch) 38, a case which is often quoted, as to ownership, it is said: "A person may be the owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship. * * * But where the general owner retains the possession, command and navigation of the ship, and contracts to carry a cargo of frieght, for the voyage, the charter party is considered as a mere affreightment, sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership."

In Leary v. U. S. 14 Wall. 607, the court in discussing a similar question, used the following language:

"There is no doubt that under some forms of a charter party the charterer becomes the owner of the vessel chartered for the voyage or service stipulated, and consequently becomes subject to the duties and responsibilities of ownership. Whether in any particular case such result follows must depend upon the terms of the charter party considered in connection with the nature of the service rendered. The question as to the character in which the charterer is to be treated is, in all cases one of construction. If the charter party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. * * * All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command possession, and control is incompatible with the existence at the same time of such special ownership in the charterer." See also Ross v. Charleston, 42 S. C. 477, 20 S. E. 285.

In the case of Bissel v. Torrey, 65 Barb. 188, the plaintiff being the owner of a canal boat employed the defendants to tow the same from Albany to New York. The boat used by defendants in towing the same, did not belong to them, but to a steamboat company, and was chartered by the defendants for the season. It was agreed that defendants were to pay so much for the round trip for the use thereof, and the company were to pay the expenses of running the boat, and were to hire and pay the men engaged thereon, and the defendants were to receive the earnings of the boat after paying expenses. The canal boat after being towed to New York, was sunk in the harbor through the negligence of the hands managing towboat. It was held that the defendants were not liable to the plaintiff for the consequences of such negligence, and that for the negligence of those employed on the towing boat, the owners alone were liable.

"It appears to me," said Judge Hough, in The Santona, 153 Fed. Rep. 518, "that the best test of the applicability of the rule to any given state of facts is to inquire whose were the agents who wrought the injury out of which the controversy in hand arose. * * * The same inquiry was put by Lord Esher in 1 Q. B. 258: "When is the captain the owner's captain?"

In clause 1 of the contract in question, the words "chartered" and "let" are indicative of a demise, but this formal part of the contract is not controlling: Grimberg v. Columbia Packers' Assn., supra; Adams v. Homeyer, 45 Mo. 545. It was stipulated in this clause that the vessel was to perform such duties in accordance with the terms of the agreement as might be required of her by the charterer. In effect it was covenanted that the defendant should direct where the vessel was to go, and what she was to do, but it does not appear that the defendant was authorized to direct how the service should be performed, or how the tug should be managed, the details of navigation being left to the owner, who retained command and possession of the vessel through the captain and crew.

Clause 6 provided that all expenses of fuel, supplies, wages of the crew and other expenses were to be borne by the plaintiffs who were to keep the vessel fully furnished, and in good condition to perform the required duties. They were at perfect liberty to employ thoroughly skilled and competent navigators for the tug at a fair compensation, or if they saw fit to take such a chance, they might employ less skilled and competent officers and crew, for smaller wages, to navigate the tug. From the evidence in the case, it also appears that the tug "Sampson" was under the direct control and management of the captain, who, from the terms of the agreement, as well as from the evidence in the case, we think was the agent of the owners, and responsible to them, and that the charter party in question did not effect a demise of the tug, but was a mere contract of affreightment: Grimberg v. Columbia Packers' Assn, 47 Or. 257; Multnomah County v. Willamette Towing company, 49 Or. 204; The Santona, 152 Fed. Rep. 516; Marcardier v. Chesapeake Insurance Co., supra; Adams v. Homeyer, 45 Mo. 545; Ross v. Charleston M. & S. Trans. Co., supra.

By clause 7 of the agreement, the parties stipulated as to risks or damages to tows, and it is contended on the part of plaintiffs that the defendant Carey thereby agreed to hold the plaintiffs harmless from all risks or damages to tows, cargo or docks, marine or otherwise. A careful examination of this part of the contract, however, clearly shows that the risks or damages to tows, cargo or docks assumed by the defendant do not extend to those arising through the negligence of the owners. No attempt was made to stipulate in regard to such damages, even if that could be done: Wells v. Great Northern Ry. Co., 114 Pac. Rep. 92.

In the case of the Steamer Syracuse, 12 Wall. 167, the court said: "It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal boat was being towed at her own risk, nevertheless the steamer is liable, if, through the negligence of those in charge of her, the canal boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

Hence as to the responsibility for the damages to the schooner "Louis" in the harbor of San Francisco and and at Knappton, the question is: first, were the injuries caused by the negligence of the plaintiffs? If so, what amount of damage was so caused? And second, what amount was defendant compelled to pay on account of such damages? In other words, if the plaintiffs through their agents or otherwise, were not negligent in the management of the "Sampson," they are not liable for such injuries. The amount paid by defendant is not the only controlling element. The objection of plaintiffs that they have a good defense to the claim of damages to the "Louis" is satisfied by the fact that they can make such defense in this action. And if defen-

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