

THE ALVEGA.¹

WEISENBERG and others v. THE ALVEGA.

(District Court, E. D. Pennsylvania. March 1, 1887.)

SHIPPING—REPAIRS—PREFERRED SHIPWRIGHT—FRAUD.

Money paid by a shipwright to the master of a ship undergoing repairs, for services connected with the contract for making such repairs, will be deducted from the shipwright's claim, although all the repairs made were necessary, and the charges therefor reasonable.

In Admiralty. Rule to show cause why decree should not be set aside.

Chas. Gibbons, Jr., and Edmunds & Driver, for libelants.

John Q. Lane, for respondents.

BUTLER, J. A decree was regularly entered in this case, founded on the admissions contained in the answer. The answer was by the master, who was also a part owner. Subsequently, other part owners, having the principal interests, applied to have the decree opened, alleging in substance, that it was obtained through collusion between the libelant and the master. A rule to show cause was granted; and this rule, with the testimony taken under it, is now up for consideration. Nothing else is involved. The question of jurisdiction, sought to be raised, comes too late; and nothing else need be said about it. A careful examination of the testimony has failed to satisfy me that any collusion existed. The repairs were necessary, and properly made. There was no motive for the fraud charged. If the master received a consideration for giving the work to one shipwright rather than another, he did wrong, and may be compelled to account for what he thus received. It does not appear that the charge for repairs was unreasonable, or that any injustice was done the ship by awarding the work to those who performed it. The decree must therefore stand.

The libelant has, however, charged the vessel with \$300.99 more than he actually advanced for repairs. It is true he handed this sum over; but it was immediately returned, pursuant to previous understanding. It was an abatement made by the shipwright in his favor, as an additional compensation for his services. The vessel should, however, have been given the benefit of it. The libelant occupied the position of its fiscal agent, for the time, and is entitled to be repaid only what he advanced and disbursed, with the customary interest. To allow one occupying his position to enter into such arrangements for his own benefit would be wrong in principle and dangerous in practice. The decree must be reduced to this extent, leaving it stand for \$7,170.01.

¹Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

GUY and others v. CITIZENS' MUT. INS. CO.

(District Court, S. D. Alabama. February 23, 1887.)

MARINE INSURANCE—LOSS—SEAWORTHINESS—PLEADING.

In an action on a marine policy, unseaworthiness is a matter of defense, and must be pleaded and proved by the insurer. The presumption is in favor of seaworthiness, and the libellant, suing to recover a loss sustained by a peril of the sea covered by his policy, need not allege in his pleading that the implied warranty of seaworthiness was complied with.

In Admiralty. Suit on policy of marine insurance. The facts are sufficiently stated in the opinion.

R. H. Clarke, for Guy, Bevan & Co.

J. L. & G. L. Smith, for the insurance company.

TOULMIN, J. By the law of marine insurance there is an implied warranty in every insurance of a ship, and in every voyage policy, that the vessel shall be seaworthy; by which is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to perform the voyage insured, and to encounter the ordinary perils, at the time of sailing upon it; and, if she is not seaworthy for the voyage, there is a breach of the implied warranty. 1 Pritch. Adm. Dig. p. 987, § 1242; Id. p. 988, § 1249.

It is held that breaches of warranty are matters of defense, and must be pleaded by the insurer. I have found no case exactly like the one we are considering, but I find cases that I think are analogous, and are controlled by the same principles. For instance, in an action on a life policy, a condition of which was that the person whose life was insured had not been afflicted with certain specified disorders or any other complaint, the company pleaded that the assured had, at the time of the issue of the policy, symptoms of disease of the stomach. Here was an express warranty that the person whose life was insured was not afflicted with any complaint. The company claimed he was afflicted, and that there had been a breach of such warranty, and this was pleaded in defense. So in an action to recover the amount of a life policy, where the stipulations were that the insured should be of sober and temperate habits. Here again was an express warranty. The company pleaded, as a matter of defense, denying the sober and temperate habits of the insured. Now, these were cases of express warranty. Why should a different rule obtain in a case of implied warranty? I am of opinion that it does not.

Here the assured sues to recover on a marine policy of insurance on a cargo of lumber. He declares that the defendant issued a policy to him covering all risks and perils of the sea to such cargo, on a voyage from one given port to another; that such insurance took effect or attached; and that said cargo was lost by a peril of the sea on the voyage named. This makes out a *prima facie* case, and entitles the assured to recover. But the insurer says, in answer to the case made: