THE VENEZUELA.

INSURANCE CO. OF NORTH AMERICA *v.* THE VENEZUELA *et al.*

MERRITT *et al.* *v.* THE VENEZUELA *et al.*

(*Circuit Court of Appeals, Second Circuit.* October 4, 1892.)

Nos. 64, 68.

ADMIRALTY APPEALS—NEW EVIDENCE—RULES OF COURT.

Rule 7 of the admiralty rules promulgated by the circuit court of appeals for the second circuit, to take effect July 2, 1892, authorizes the taking of new proofs only on sufficient cause shown to the court or a judge thereof pursuant to an application made within 15 days after the filing of the apostles, and upon 4 days' notice to the adverse party. *Held*, that this rule will not be enforced as against a party whose case was tried in the district court prior thereto, in reliance upon the right to introduce such new testimony on an appeal as was permissible under the then existing rules and practice of the circuit; and in such a case the court will, as under the old practice, receive new material evidence which was not intentionally withheld in the district court. The new rule is not an innovation in admiralty practice.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Separate libels filed by the Insurance Company of North America and the Atlantic & Gulf Wrecking Company, on the one hand, and by Israel J. Merritt and Israel J. Merritt, Jr., on the other, against the steamship Venezuela, her tackle, etc., and her cargo, (John Dallett and others, constituting the firm of Bailton, Bliss & Dallett, being claimants,) to recover for salvage services. The cases were heard together in the district court, which awarded $6,500 to the first-named libelants and $33,500 to the Merritt Wrecking Company. See 50 Fed. Rep. 607. An appeal was taken by the first-named libelants in the one case and by the claimants in the other, the appeals being numbered 64 and 68, respectively, on the docket of this court. The case is now heard on the motion of the appellees to suppress certain depositions filed in this court by the appellants, and containing new evidence not offered below.

Robert D. Benedict, for the motion.

George A. Black, opposed.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. We think the facts stated in the opposing affidavits should excuse the appellant for not making the application for leave to take new proofs required by rule 7, Appeal Rules in Admiralty, promulgated by this court May 20, 1892, to take effect July 1, 1892. It would be unjust to a party whose case has been tried in the district court in reliance upon the right to introduce such new testimony upon an appeal as was permissible under existing rules to preclude him

from doing so because of limitations imposed by rules of court subsequently made. The language of the rule does not require a retroactive effect to be given to it, and we are disposed to treat the motion to suppress the depositions taken by the appellant as though the appellee were showing cause, pursuant to the old rule, (No. 130,) why the appellant should not offer new proofs. Prior to the adoption of the new rule, it was not the practice in this circuit to allow parties upon an appeal in an admiralty cause from the district court to introduce as new evidence that which was available at the hearing in the district court, and had been deliberately withheld. *The Saunders*, 23 Fed. Rep. 303; *The William H. Payne*, 25 Fed. Rep. 621; *Singlehurst* v. *La Compagnie*, decided in this court January 18, 1892, (1 U. S. App. 126, 1 C. C. A. 487, 50 Fed. Rep. 104.) It had not been definitely decided, however, that the introduction of evidence should be precluded merely because it had been negligently omitted at the hearing in the district court; and, by the general acquiescence of practitioners, and perhaps of the judges, it had come to be implied that any new evidence might be offered which was material, and had not been intentionally withheld at the trial below. The purpose of the new rule is to reform what had become a mischievous practice in this circuit, and to require the exercise of a sound discretion by the judges of this court in refusing to allow parties to offer testimony which ought to have been produced, but was not produced, in the court of original jurisdiction.

The rule is not a new departure from the recognized practice of courts of admiralty generally, but conforms to it. In *The Generous*, 2 L. R. Adm. & Ecc. 57, 64, Sir ROBERT PHILLIMORE said:

> "The court will require good reason to be shown why evidence not produced before the court below should be introduced in this court, and will exercise a discretion, according to the circumstances of the case, on this subject; entertaining a strong opinion, upon general principles, which are too obvious to require to be stated, that such discretion should be exercised with great reserve and caution."

In *The Mooresly*, 1 Asp. 471, decided in 1872, the same judge refused the application to examine two witnesses who had not been examined in the court below, because it did not appear that there was any surprise owing to the absence of the witnesses. In *The William*, 7 Ir. Jur. 354, the reporter's note is as follows:

> "This court will admit additional evidence upon appeal, if it appears by affidavit that it was impossible for the party or parties in the court below to tender it at the original hearing; the witnesses being nautical men, whose attendance is not always available."

The earliest reported case upon the subject in this country is *Rose* v. *Himely*, Bee, 313, decided by Mr. Justice JOHNSON in the supreme court at circuit in 1805. The decision was that the question whether new evidence could be adduced on appeal must depend upon the nature of the evidence proposed to be adduced, and the sufficiency of the reasons given to show that the inability of the claimant to produce such evi-

dence at the time of the trial in the district court was not attributable to his own laches. The next case was *Coffin* v. *Jenkins*, 3 Story, 108, 120, which arose on the question of amendment of an answer involving new proofs to support it. In refusing to allow the amendment, Judge STORY said:

"The matter of defense must have been well known when the cause was in the court below, and ought then, if ever, to have been insisted on, as, if well founded, it disposed of the whole suit. This court ought in all cases to be very cautious in admitting any new matters, either of allegation or of defense, to be introduced here, when the facts on which they rest are not new or newly discovered, but were perfectly known at or before the hearing in the district court. We should otherwise constantly have appeals here entertained upon matters never brought to the notice of the district court, and might virtually exercise an entirely original jurisdiction, instead of an appellate jurisdiction."

In *The Schooner Boston*, 1 Sum. 331, the same learned judge used the following language:

"It being clearly established that a knowledge of the circumstances had not been brought home to the claimants until after the decree of the district court, this court had no difficulty, at a former hearing, in allowing the claimants to file a supplementary answer and defense on this point."

Upon the general proposition that, although appellate courts in admiralty treat an appeal as a new trial, and exercise much liberality in permitting new proofs and new pleadings in furtherance of justice, they are not constrained by any arbitrary rules to receive testimony which ought to have been produced, but was not produced, in the court of original jurisdiction, the following judgments may be cited: *The Osiris*, 1 Hagg. Adm. 135; *The General Palmer*, Id. 323; *The Glenmanna*, 2 Lush. 122; *The Flying Fish*, Brown. & L. 436; *The Samuel*, 1 Wheat. 9; *The Mary*, 8 Cranch, 388; *The Grey Jacket*, 5 Wall. 342; *The Mabey*, 10 Wall. 419; *The Western Metropolis*, 12 Wall. 389; *The Juniata*, 91 U. S. 366. The present case illustrates very well the necessity of adhering to the restrictions provided by the new rule. The new depositions taken by the appellant are all of them of witnesses whose testimony might have been procured readily by the exercise of reasonable diligence. The controversy is one as to the value of salvage services rendered to the steamship Venezuela by the steamer North America and the tug Buckley. The appellant now offers the depositions of Chambers, who was master of the Venezuela at the time of the salvage, and of Hopkins, a former master of the Venezuela, who was on board her at the time of the salvage service; of Skillings, mate of the Venezuela, on board her at the time; of McEllwie, master of the tug Buckley, on board at the time of the service; and of Dallas, a witness for the appellant who was examined at the trial in the district court. If these witnesses had been produced, as they might have been, and examined, in the district court, very likely the controversy would have ended there, and the delay and expense of this appeal been dispensed with; but, in any event, this court would have had the benefit of the judgment of the district court upon

the value of their testimony. Nevertheless we cannot find that the testimony of the new witnesses was intentionally withheld, or that the failure to examine them was attributable to gross laches, and, adhering to the prevailing practice at the time the cause was tried and the appeal was taken, the only deposition which we feel justified in suppressing is that of the witness Dallas.

THE MATTANO.

MARINE RAILROAD, SHIPBUILDING & COAL CO. *v.* THE MATTANO *et al.*

(*Circuit Court of Appeals, Fourth Circuit.* October 11, 1892.)

No. 15.

1. CIRCUIT COURT OF APPEALS—JURISDICTION IN PENDING CASES.
   In an admiralty case, in which an appeal to a circuit court was taken prior to July 1, 1891, its decrees are reviewable, under Act March 3, 1891, § 6, in the circuit court of appeals, whose jurisdiction was not suspended or limited in any way by the joint resolution of the same date, which merely preserved the right of the circuit courts to hear appeals in cases then pending, and in proceedings to review such pending cases taken out before July 1, 1891.

2. CONTRACT—ACTION—BURDEN OF PROOF.
   On a libel *in rem* for money due on a contract for repairs, where it is admitted that the labor and materials set forth in the bill of particulars were furnished, and that the job was well done, the agent of the owner having signed certificates as to the correctness of each day's statement, and its conformity with the contract, the burden of proof is on the owner to show any errors in the bill of particu ars.

3. SAME—REPAIRING VESSEL—DELAY—EVIDENCE.
   On a libel *in rem* for repairs to a vessel a reduction of charge for expenses incurred by the owner because of unreasonable delay should not be allowed, when he has not betrayed any marked impatience during the work, and his agent has each day certified to the daily statement of the work done without making any complaint therein, although the owner did grumble a little, to hurry the libelants up.

4. SAME—DAMAGES FOR DELAY—PROFITS PREVENTED—EVIDENCE.
   A claim for reduction in the charges for profits which the owner might have made but for unnecessary delay should not be allowed, when it rests upon mere conjecture by the master and owner, it being in their power to give certain testimony by reference to the books of the vessel.

5. SAME—FALSE REPRESENTATIONS—KNOWLEDGE BY BOTH PARTIES.
   An assertion by the agents of the libelants that the shipyard was as well prepared as any they knew of to do the work, as far as machinery was concerned, even if an exaggeration, in view of the fact that they had no band saws, was not such a warranty as would authorize a reduction of charges for waste of lumber in cutting by hand, when the owner was in the shipyard, and might have seen whether they used band saws.

6. SAME—OVERCHARGES.
   The owner offered to furnish the lumber, but the libelant replied that it was not necessary, and that the prices therefor should be made satisfactory. The owner's agent objected to the charge for lumber in the first daily abstracts, but, on being told that the price would be made satisfactory in the settlement, signed them. *Held*, that the owner was misled by the statements of the libelant, and was entitled to a reduction of charges under this head.

7. SAME—EVIDENCE.
   A claim of overcharge for lumber used in scaffolding, not supported by any evidence as to how much was so used, should be disallowed.