

complaint. The decree of the lower court is therefore reversed, and this cause is remanded to that court with the instruction to dismiss the bill, with costs.

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THE EDWARD H. BLAKE.

(Circuit Court of Appeals, Fifth Circuit. January 31, 1899.)

No. 753.

1. APPEALS IN ADMIRALTY—RECORD—TRANSCRIPT OF EVIDENCE.

A transcript of appeal in admiralty should contain all the evidence adduced on both sides. When such evidence is not reduced to writing in the lower court, and there is no rule of that court requiring it to be reduced to writing, it would seem that an appeal can only be heard on the merits, where the evidence adduced appears by an agreed statement of facts, or where a statement is made by the court of the evidence adduced, or of the facts proved.<sup>1</sup>

2. SHIPPING—CONSTRUCTION OF CHARTER PARTY—AUTHORITY OF MASTER.

While a master has no power to set aside the contract made by the charter party, yet where, at the time of loading, questions arise between the ship and the charterer as to the proper construction of minor clauses in the contract, in the absence of the owners, the master, as their agent, must necessarily deal with the same, and his construction and agreements in relation thereto are binding on the owners.

Appeal from the District Court of the United States for the Eastern District of Texas.

This is an appeal from a final decree of the district court for the Eastern district of Texas, entered June 9, 1897, adjudging that the libelant (appellee herein) is not entitled to recover as prayed for, and that its libel be dismissed; and, further, that respondents (appellants herein) are not entitled to recover upon their cross libel, and each party should pay all costs herein. The libel was filed May 7, 1897, by the Reliance Lumber Company. It alleged that on the 1st day of April, 1897, it chartered the schooner Edward H. Blake to carry a cargo of "resawed yellow pine lumber and boards and ties, and a small quantity of oak ties (it is understood that the oak ties are white oak, and weigh about the same as pine)," and transport the same from Sabine Pass, Tex., to Vera Cruz, Mexico; freight to be \$5.50 per 1,000 feet for pine lumber and oak ties, and \$5.25 per 1,000 feet for pine ties. The charter party or contract of affreightment further provided that libelant (charterer) would not be obliged to commence loading the vessel before April 15, 1897,—lay days for loading and discharging to commence from the time the vessel is ready to receive or discharge cargo, at least 25,000 feet per running day, Sundays and legal holidays excepted; that for each and every day detention by default of charterer or agent it should pay the owners of said schooner or their agents \$50 per day, from day to day; that said cargo should be delivered by libelant and received by libelees within the reach of vessel's tackle; that, in pursuance of the charter, said schooner was at Sabine Pass, Tex., and ready to receive cargo, on the morning of April 15, 1897, and that libelant then proceeded to furnish cargo in strict compliance of the charter party; that on or about the 1st day of May, 1897, James H. Smith, the master, refused to receive or load the lumber tendered to said vessel by libelant, and protested against receiving the lumber tendered, because the oak ties furnished were of weight more than 40,000 pounds in excess of what would have been the weight of a like number of pine ties; that the oak ties were of weight one ton to the 1,000 feet in excess of pine, and that said vessel's carrying capacity would, by reason thereof, be 40,000 feet less than that of pine ties; that there-

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<sup>1</sup> As to admiralty appeals in general, see note to *The Venezuela*, 3 C. C. A. 322.

after, by way of compromise, the parties then agreed with each other that the term "small quantity of oak ties," as used in said charter party, should mean 50,000 feet of oak ties, and that libelant should be permitted to load on said vessel any amount of oak ties in excess of the 50,000 feet that it desired by paying additional freight of 50 cents per 1,000 feet; that said schooner continued to receive and load such lumber and oak ties as were furnished by libelant until about the 6th day of May, 1897, when libelant tendered three cars of white oak ties, aggregating about 25,000 feet; that libelant then and there ignored said charter contract and agreement, and, in gross violation thereof, again presented protests, and refused to load said three cars of white oak ties, aggregating 25,000 feet; that libelant well and truly performed and kept all the covenants, etc., on its part in said charter party to be performed, but that neither the said James H. Smith, nor said vessel or owners, have performed therein their covenants in said charter party by them to be performed and kept, but have failed and refused to keep the same in the receiving and loading said three cars of oak ties; that libelant is damaged \$2,000, and prays for admiralty process against the vessel, and that the court construe the charter party. On June 7, 1898, libelant filed its amended libel, setting up same facts as original libel, and attached thereto copy of charter party, and copies of three protests served upon it by respondents; one executed on May 1, 1897, and served upon it, wherein the master protested that he was not being loaded as per charter party, and that he would not receive said three cars of oak ties unless allowed extra freight to cover differences in weight between it and pine. Another protest, executed on the 8th day of May, 1897, wherein the master protested at the way his vessel was being loaded, as being not in compliance with the terms of the charter party, and affirming that, if forced to receive said oak after this, his solemn protest, he would hold the Reliance Lumber Company bound to pay all shortage in freight, which affiant alleged would be at least \$275, as well as all demurrage and other damages in addition thereto. On May 14, 1897, respondents executed and filed another protest, affirming to hold libelant responsible for all shortage in freight by reason of not being loaded as per charter party, and also for demurrage.

Respondents (appellants herein) on May 20, 1897, filed a paper denominated "exception, answer, and cross libel," admitting the execution of the charter party, and alleging, as per terms of same: That the schooner Edward H. Blake reported at Sabine Pass at 7 a. m., April 15, 1897, in writing, that she was ready to receive cargo as per charter party. That thereupon the charterers and the agents began loading said vessel, but, instead of loading "re-sawed yellow pine lumber and boards and ties, and a small quantity of oak ties, about the same weight as pine," as was stipulated for in the charter party, libelant, over respondents' solemn protest, loaded upon said schooner large quantities of green oak ties and oak lumber, to wit, more than 75,000 feet, which weighed more than one-half more than the same number of feet of pine, by reason of which said schooner was loaded down so that she was drawing more than 15 feet 2 inches aft and 13 feet 6 inches forward, with her holds full, which showed an increase of 80 long tons in weight over what said schooner would have had in her hold if she had been loaded as was stipulated in said charter party. Respondents attached to and make part of their answer affidavits certifying to weight of oak tendered and loaded, averaging 6½ pounds to the foot, board measure. That, after loading said 75,000 feet of oak ties, libelant further tendered respondents three additional cars of oak ties and oak lumber, which respondents protested against receiving. Libelant then notified respondents that no other lumber would be furnished said schooner until said three cars were loaded. Respondents then permitted said three cars to be loaded after protest and notifying said libelant that it would be held responsible for all damages by reason of the loss of freight and demurrage sustained by said schooner by reason thereof. That, after said schooner was loaded under protest, as hereinbefore set forth, libelant failed and refused to furnish respondents invoices, so that they could clear, and go to sea, until the 15th day of May, 1897. Respondents signed the bill of lading with protest attached, to the effect that the invoices which respondents were required to sign, and which they did sign under protest,