

Wood Steamer "Elizabeth Ruth," now $\frac{1}{2}$ "Flying Cloud"

ALLEGED DEFECTIVE CONSTRUCTION.

CLAIM AGAINST SHIPBUILDER.

When a shipowner accepts delivery of a vessel and afterwards defects develop because of unauthorised departure from the contract specifications, he may not plead this as a defence against the builder's claim for balance of contract price and for extras, but is entitled to deduct therefrom the damage sustained from defective and unauthorised construction. In January, 1918, says *Nauticus* (New York), the Mississippi Shipbuilding Corp., with office in New York and shipyard at Biloxi, Miss., entered into a written agreement with Lever Bros., through W. H. Woolner, attorney-in-fact, to be built in accordance with the requirements of 1,500 tons deadweight, dimensions 193ft. by 37ft. by 18ft., equipped with two Fairbanks-Morse marine oil engines of 100 h.p. each, the vessel to be built in accordance with the requirements of Lloyd's Register for highest class, delivery March 15, 1918. By sec. 2 of the contract the purchaser had the right to make additions to or changes in the plans provided no delay in delivery was involved, by giving due notice in writing to the builder, and paying for the cost of such changes or receiving credit therefor, as the case might be. Sec. 8 gave the shipowner or his representative the right to inspect the schooner and materials assembled therefor, and to appoint a competent inspector to carry out such inspection. The price of the schooner was 145 dol. per ton deadweight.

Construction work was completed in August, 1918, and was in the meantime supervised by Captain Kerr and J. M. Buchanan, Lloyd's surveyor at New Orleans. Lloyd's classification certificate was issued before the vessel, the Elizabeth Ruth, put to sea, Sept. 3, 1918, on her maiden voyage, which proved disastrous. The engines failed to work properly and heated to such an extent that they could not be used. The vessel sprang a leak and took in so much water that when out a few hundred miles on the Pacific the crew refused to proceed further, and her master took her back to Balboa, whence she was sent on to Mobile to undergo repairs and make her fit for use. In the meantime the shipbuilder had begun action to recover a balance of 43,250 dol. due him in respect of the purchase price, and extras amounting to 67,361 dol., or a total of 110,591 dol. The shipowner set up a counter-claim for defective construction and damages amounting to 400,000 dol.

The cross-section plan of the schooner and the edge bolting plan as approved by Lloyd's called for the ceiling or sides of the ship to be edge bolted. Edge bolting is the bolting of the ceiling, which is the inside skin of the ship, by bolts from the top right down through the ceiling. In order to save time and some other difficulties, this was omitted and "clenching," a different kind of fastening substituted. No written authorisation or direction was given for this change, which was extremely important and very substantial. Witnesses testified, at the trial of the action, that the leaking of the ship resulting in the disaster at sea was due to the absence of this edge bolting, and all or much of the expense to which the shipowner was put in order to make the vessel seaworthy was caused by this change in the plans. The shipowners stated that Kerr had authorised this modification, and that Buchanan acquiesced. Woolner, agent for the shipowner, denied knowing anything about it, and Buchanan also denied that he ever gave his permission to such a change.

CHANGE IN PLANS.

In this particular of bolting, the plans were departed from in a very material and substantial respect, which caused much damage to the shipowner. The Supreme Court, New York, gave judgment for the shipbuilder, but the Appellate Division was of the opinion that as the plans had not been followed the plaintiff could not recover anything for his work and services under the contract or for the amount of extra work and material furnished. On appeal by the shipbuilder, the Court of Appeals, New York, said, in restoring the original judgment, that the finding of the Court below would have been the law if the defendant had rejected the ship and had returned it to the plaintiff. "The fact is," said the highest Court of New York State, "that the defendant accepted the ship and still has it in his possession. Under these circumstances it cannot keep the ship and refuse to pay the plaintiff the balance due it over and above the damage sustained."

The defendant was required to give notice. This action was commenced February 6, 1919. Defendant served its answer March 12, 1919. The vessel set out upon its voyage in September of 1918, and returned after its disastrous attempts to make a voyage in March of 1919, when upon examination the absence of the edge bolting and the other alleged defects and departures were discovered. The service of the answer and the bill of particulars calling attention to absence of the edge bolting was sufficient notice of a breach of the plaintiff's warranty within this provision of the Personal Property Law, provided that the first knowledge that the defendant had of the defective and faulty work was upon the return and examination of the ship. But was this the first time he had knowledge of the omission of the edge bolting? Captain Kerr was its servant and agent to watch the building of the vessel, to see that the plans were complied with and the edge bolting used in accordance with the drawings and specifications. Did he know that there was this change made in the work? Was his knowledge the knowledge of the defendant? Kerr was not called as a witness. Buchanan swears he did not know of the omission, and so does Woolner. If Kerr knew all about it and attempted to authorize it, his knowledge might be that of the defendant. . . . The defendant, by accepting the ship and failing to return it had a right to sue for the damages occasioned by departures from the plans and specifications upon giving the required notice.

DAMAGES MIGHT BE OFFSET.

These damages could be offset against the plaintiff's claim under his contract for the work which was performed and for the extras furnished. The rule does not apply as strictly regarding personal property as it does regarding real property. When buildings have been constructed upon real estate, as the owner cannot return the buildings he may keep them and refuse to pay the contract price if there has been a breach. Personal property, however, like a ship (*Rivara v. Stewart & Co.*, 226 N. Y. Memo. 99) can be rejected or returned or its acceptance refused (*Cawley v. Weiner*, 236 N. Y. 357; *Maok v. Snell*, 140 N. Y. 193; *Spence v. Ham*, 27 App. Div. 379, 382). Where this is not done the purchaser must pay the contract price unless he gives notice of a breach of warranty in the contract. Upon giving such notice he has his claim for damages, which may be prosecuted by action or set up as a counter-claim when sued for the price. This being the law, the plaintiff did not have to allege in his complaint a waiver, but could have sued for his contract price. This he could have recovered if there had been no notice of the breach of any promise or warranty given within a reasonable time after the defendant knew of it.

He attempted, however, to set forth in his complaint a waiver. No doubt he had in mind a waiver as to the time of performance, there being penalties attached for delays. He stated as the cause of the delay the changes which had been required by the defendant. The plans, the complaint said, had been changed, and the performance of all the requirements waived by the defendant. These changes caused delay. We think these allegations were sufficient to enable the plaintiff to prove a waiver of the plans as stated in the bill of particulars, and also prove that the defendant or his authorised agent had changed the edge bolting to clinch bolting. . . . The difficulty, however, remains that according to the proof the plaintiff was unable to show a waiver of the edge bolting, as neither Kerr nor Buchanan had authority to make this change. In fact, the judge in his charge to the jury instructed them that neither Kerr nor Buchanan had authority to waive this provision of the contract.

NEW TRIAL ORDERED.

The Appellate Division reversed this case upon questions of law, dismissing the complaint. As they were in error as to the law, for the reasons above stated, we would be required to reinstate the verdict for the plaintiff if it were not for errors which would have necessitated a reversal anyhow and a new trial.

That the absence of edge bolting caused the

Alleged Defective Construction—(Continued).

leak was strongly contested. It was claimed by the plaintiff that the ship had been loaded with caustic soda; that this was improperly loaded; that it escaped and caused all the damage to the ship. Some witnesses saw the effects of the soda discharged in the pumping; others denied that any caustic soda escaped at all. Captain Kerr was in charge of the vessel. He was not a witness. Buchanan was asked, however, if in a talk he had had with Captain Kerr the captain had not admitted that caustic soda caused the damage. (Buchanan testified that Kerr and Lodder, the engineer, had told him that the vessel had leaked considerably on her initial voyage, and that they had pumped a great deal of caustic soda in solution through the pump.) This evidence was clearly hearsay. The exception to the ruling admitting it presents reversible error.

The judgment should be reversed and a new

trial ordered, with costs to abide the event.

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