

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1913
 Sept. 24.

THE VICTORIA MACHINERY DEPOT
 COMPANY, LTD., PLAINTIFF;

AGAINST

THE STEAMSHIPS CANADA AND TRIUMPH.

Shipping—Admiralty Practice—Rules 35, 36, 37 and 39—Affidavit to lead Warrant—Supplementary Affidavits—“An owner domiciled in Canada”—Mortgages—Necessaries—Statutory Lien—Promissory Notes—Dishonour—Right to sue for original debt.

Where an affidavit to lead warrant does not disclose that the Court is seized of jurisdiction, leave may be given to the plaintiff to file supplementary affidavits shewing that there was jurisdiction to issue the warrants and that the case is one in which the discretion of the Registrar under Rule 39 could be properly exercised.

2. A company whose head office is in England, although registered and licensed to carry on business in British Columbia, is not “an owner domiciled within Canada” within the meaning of Rule 37.
3. Where necessaries have been supplied in British Columbia to a ship which is away from its home port and has no owner domiciled in the province, a statutory lien for the same arises upon the arrest of the ship, and the lien may be enforced either upon the trial or upon a subsequent motion.
4. Where promissory notes have been accepted for part of the claim for necessaries and have been dishonoured the ship may be sued for the original debt.

TWO motions were heard by the Honourable Mr. Justice Martin, Local Judge of the British Columbia Admiralty District, at Chambers in Victoria on September 3rd, 1913, in an action *in rem* for necessaries, on behalf of the receiver and manager of the British Columbia Fisheries, Limited, (owner of the steamships *Canada* and *Triumph*) and of the trustees of a debenture mortgage covering said ships, to vacate certain warrants for arrest of the ships.

The grounds upon which the motions were based appear in the reasons for judgment.

W. J. Taylor, K.C., in support of the motions.

E. V. Bodwell, K.C., and *W. C. Moresly*, *contra*.

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MARTIN, L. J., now (September 24th, 1913) delivered judgment.

Reasons for
Judgment.

These are two separate motions on similar material, heard together for convenience, on behalf of the receiver and manager (appointed on 13th August, 1913, by the High Court of Justice in England) of the British Columbia Fisheries, Limited, (owners of the steamships *Canada* and *Triumph*) and of the trustees of a debenture mortgage covering said ships, to vacate the warrants issued against the said ships now under arrest of the Marshal on the grounds that the affidavits to lead to warrant do not comply with Rules 35 and 36, it not being stated therein (a) what the "nature of the claim" is but only that:—

"2. The plaintiff has at the request of the defendants or their agents done work and rendered services to the *Canada*, a British vessel belonging to the port of Grimsby, England, to the amount of \$3,217.37.

and (b), if it can be assumed that the action is for necessities, the domicile of the owner within Canada is not deposed to; and (c), if it can be assumed that the action is for building, equipping or repairing, the fact that the ship is under the arrest of the Court, is not deposed to. My recent decision in *Letson v. Tuladi* (1) on the power of the Registrar under Rule 39 to dispense with certain "prescribed particulars" in the affidavit, was relied upon by the plaintiff in answer to these objections, but it was submitted by the defendants in

(1) (1912) *Ante*, p. 134.

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reply that though the registrar may so dispense, yet my decision does not go to the length of holding that such dispensation would confer upon this Court a jurisdiction which it did not in fact possess. This submission is, I think, correct, and according to the facts disclosed in the affidavits filed before the Registrar, and in support of this motion, this court would not have jurisdiction to issue the warrant for arrest. But an application was made by the plaintiff on the return of the motion to file supplemental affidavits to prove such facts as would show that in reality there was jurisdiction and that the case was one in which the discretion of the Registrar could be and was properly exercised, and I allowed the affidavits to be read for that purpose, and they did establish jurisdiction showing that the claim, or at least a large portion of it, was for necessaries (as defined by, e.g. *Webster v. Seekamp* (1); *The Two Ellens* (2); and *The Riga* (3), approved in *Foon Tai v. Buchheister* (4), and that "no owner or part owner of the ship [was] domiciled within Canada at the time of the institution of the action", because the owning company having its head office in London, England, has its domicile there within the meaning of the authorities which will be found conveniently collected in *Pearlman v. Great West Life Insurance Co.* (5), where the question was recently considered. I have not overlooked the fact that this company is licensed and registered to carry on business within this province under sec. 152 of the *Companies Act*, R.S.B.C., cap. 39, and that it has "the same powers and privileges in this "Province as if incorporated under the provisions of "this Act", but that language does not change or alter

(1) (1821) 4 B. & Ald., 352.

(2) (1871) L. R. 3 Ad. & E., 345;
 L. R. 4 P. C., 161.

(3) (1872) L. R. 3 Ad. & Ec., 516.

(4) (1908) A. C., 458 at p. 466.

(5) (1912) 17 B. C. R., 417.

its constitution or domicile, and it is not one of the "privileges" enjoyed by British Columbia companies that they should have two head offices, one of which could, *e.g.*, be used as a means to pursue its debtors, and the other to evade its creditors. The distinction between the "head office of the company" (*i.e.* its "home") and the "head office of the company in the Province" is preserved in the form of the license and of certificate given in secs. 154 and 160, sub-secs. (b) and (c).

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But it is further contended in support of the motion that since at the time of the arrest the ships were in the possession of the said receiver, under the said debenture mortgage, duly registered in the Port of Grimsby, England, the registered port of the defendant ships, therefore as the lien for necessaries is not a maritime one, and the possessory lien has been lost, there is no other lien that can be enforced in the circumstances, and the arrest is of no avail.

While it is true that the plaintiff herein has no maritime or possessory lien, yet since he has supplied necessaries here to a ship, which I assume for the purposes of the argument, (1) though not a foreign one, is yet away from its home port and has no owner domiciled in British Columbia (which under sec. 2a of the *Colonial Courts of Admiralty Act*, 1890, must be substituted for "England and Wales" in the *Admiralty Court Act*, 1861, sec. 5) he has acquired a statutory lien for such necessaries when the ship was arrested under the warrant of this Court. The fact that it may turn out that such lien may be postponed to a prior charge or charges by way of lien or mortgage or to the claim of a bona fide purchaser of the ship for value does not prevent its enforcement so far as may be

(1) See *The Ocean Queen*, (1842) 1 W. Rob., 457.

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lawful upon the facts to be hereafter established, either upon the trial or upon a subsequent motion furnishing "the necessary materials for a judgment", as has been done in many cases, *e.g.*, *The Scio* (1). See also the following authorities which justify my view: *Abbott on Shipping* (2); *McLachlan on Shipping* (3); *Williams & Bruce* (4); *The Troubadour* (5); *The Pacific* (6); *The Aneroid* (7); *The Rio Tinto* (8); *Foon Tai v. Buchheister*, *supra*, and lastly and chiefly *The Cella* (9), applying the decisions in *The Two Ellens*, (10), *The Pieve Superiore* (11) and the *Heinrich Bjorn* (12). Thus in *The Cella*:—

"They shew that though there may be no maritime lien, yet the moment that the arrest takes place, the ship is held by the Court as a security for whatever may be adjudged by it to be due to the claimant." (p. 87).

And p. 88:—

"It appears to me that so long as 1842 Dr. Lushington in *The Volant* explained the principle upon which the Court proceeds, when he said that "an arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate payment." The arrest enables the Court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment. That is Dr. Lushington's decision, and I think is a right one."

With respect to the objection taken that promisory notes had been accepted for the amount of the claim the answer is, first, that the affidavits show that the notes

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| (1) (1867) L. R. 1 Ad. & E., 353. | (7) (1877) 2 P. D., 189. |
| (2) (1901) ed. pp. 49, 183, 1023. | (8) (1884) 9 A. C., 356, 362-3. |
| (3) (1911) ed. pp. 115-20. | (9) (1888) 13 P. D., 82. |
| (4) <i>Admiralty Practice</i> (1902) ed. p. 198. | (10) (1871) L. R. 3 Ad. & Ec., 345, 4 P. C., 161. |
| (5) L. R. 1 Ad. & Ec., 302. | (11) (1874) L. R. 5 P. C., 482. |
| (6) (1864) Br. & L., 243. | (12) (1886) 11 A. C., 270. |

are only for a part thereof, the sum of \$2,224.98 not being covered thereby; and, second, since the notes have been dishonoured, the ship may be sued for the original debt.—*The N.R. Gosfabrick* (1).

The result is that the motions will be dismissed, with costs to the plaintiff in any event.

Orders accordingly.

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