BRITISH COLUMBIA ADMIRALTY DISTRICT

1922
Nov. 17.

ERIKSEN BROS. (AND OTHERS).....PLAINTIFFS;

AGAINST

THE SHIP *MAPLE LEAF.*

*Shipping and seamen—Arrest of ship—Mala fides—Sham proceedings—Value of de facto arrest as basis for jurisdiction.*

A ship was arrested at the suit of H.E. who, at the time of said suit, was a member of the firm of Eriksen Brothers, one of the plaintiffs herein. His claim for wages as ship's carpenter on board the ship, was in fact only a part of his firm's claim sued on herein, and the day following such arrest of the ship the firm's action was instituted.

The other plaintiffs finding the ship under arrest took action in the Court for work done by them upon the said ship.

*Held* that the facts disclosing *mala fides* and an abuse of the process of the court, the arrest could only be viewed as a sham proceeding, and without legal existence as regards Eriksen Brothers who improperly sought to profit by it, but, that the other claimants, being in good faith and innocent of any wrong-doing at the time of instituting their suits, and relying upon the records of the court which, on their face, showed jurisdiction could be invoked, are entitled to rely upon such arrest to give jurisdiction to entertain and support their suit.

FOUR ACTIONS to recover for the value of services rendered the ship in equipping and altering the same.

September 12th and 13th, 1922.

Actions now tried before the Honourable Mr. Justice Martin at Vancouver.

*E. A. Lucas* for plaintiffs Eriksen Bros., Christian and Hemeon;

*Cecil Killam* for plaintiff Daly;

*Hume B. Robinson* for the Ship *Maple Leaf.*

The facts herein and questions of law involved are stated in the reasons for judgment.

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See Eriksen Bros. v. The Maple Leaf. 21 Ex. C.R. 401.

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MARTIN, L.J.A., now (November 17th, 1922) delivered judgment.

These are four actions for equipping and altering the gasoline boat *Maple Leaf* at the port of Vancouver, to which she belongs, and it has been agreed that evidence taken in all of them shall apply to each of them. The vessel had been used as a cargo boat plying from Vancouver to the Islands in the inside waters of the Gulf of Georgia, but after she came into the temporary possession of a new owner, one Thompson, in April last under an agreement for sale, he decided to employ her in outside waters which necessitated (apart from the state of good repair she was in), certain alterations in and additions to her pilot house, rig, spars, sails, tanks, etc., and it is for various parts of this work that the respective claims are asserted.

At the outset objection is taken to the jurisdiction to entertain these claims on the ground that they are for necessaries which were not supplied to a ship "elsewhere than in the port of which (she) belongs," under sec. 5 of the "Admiralty Court Act, 1861," but "in that port," *i.e.*, Vancouver, in answer to which objection the plaintiffs submit that assuming the work of these material men [as they have long been called, *The Neptune*, (1)] may be classed as necessaries, yet quite apart from section 5, their claims are "for the building, equipping or repairing of any ship" under section 4, and so there is jurisdiction because

> at the time of the institution of the cause the ship or the proceeds (were) under arrest of the court,

as section 4 goes on to require. In *The Neptune* it was said, respecting the ancient remedy of material men as then regarded, and the scope of their operations, p. 142:—

> Those are commonly called material men, whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provision (necessary in any kind). Those men, when they have furnished any victuals or materials upon the credit of a ship, are certain losers, if they be prohibited from taking their remedy against such ships, by arresting and proceeding to gain a possession of the ship itself till the debt be satisfied, according to the ancient course of the Admiralty.

(1) [1834] 3 Hagg. 129 at p. 142.

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Upon the facts it is beyond doubt that the work herein, though not "repairing" is nevertheless within the expression "building and equipping" as employed in section 4: "building" would obviously include additions built on to the original building, and "equipping" is a very wide term depending upon the service in which the ship was employed, just as frequently "there is very little distinction to be found between "repairs" and "necessaries" under sections 4 and 5 respectively—The *Skipwith* (2), wherein Dr. Lushington said:—

> Now with respect to the 4th section; I am of opinion that, however the claim originally arose, whether it arose from giving credit to the master of the vessel, or not—provided that the claim was not satisfied at the time, and that the work for building, equipping or repairing had been done and provided, also that the ship and proceeds were under the arrest of the court—it was and is competent to the party to proceed here.

In *MacLachlan on Merchant Shipping (1911)*, at p. 117, it is said that claims for necessaries under section 5 "would no doubt cover repairs and equipping which further illustrates how the two sections are interwoven; and in the leading case of the *Riga* (3) [affirmed by the Privy Council in *Foong Tai & Co.* v. *Buchheister* (4), and applied by me in *Victoria Machinery Depot Co.* v. *The Canada* (5)], Mr. Justice Phillimore said:

> I am unable to draw any solid distinction * * * between necessaries for the ship and necessaries for the voyage.

I see no reason, therefore, why said sec. 4 does not cover these claims, and this view brings me to the further objection that although the work had been ordered by the master, Lewis, on behalf of the purchaser, Thompson, who was in sole possession of her under said agreement for sale for $5,250 (upon which he paid $500), yet the ship was not liable because the vendor, Brooks, still remained as owner upon the registry, and later re-took possession before action upon default in payment of the balance. Brooks, however, not only gave absolute possession to Thompson originally but had personal knowledge of the alterations, etc., that were being carried on and actually worked on them himself

(2) [1864] 10 L.T.R. 43.
(3) [1872] L.R. 3 Adm. & Ecc. 516, 522.
(4) [1908] A.C. 458, at p. 462.
(5) [1913] 18 B.C.R. 515.

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in making spars, and raised no objection because, he says in cross-examination, "I didn't consider it my business." In those very unusual circumstances there is no similarity between these cases and those three relied upon by Brooks' counsel, viz:—*Young* v. *Brander* (6); *Mitcheson* v. *Oliver* (7), and *Hibbs* v. *Ross* (8), and the nature of the actions is entirely different, being personal and not *in rem.*, when carefully examined, indeed, the *ratio* of their principles supports the plaintiffs herein; note *e.g.*, the observations of Mr. Justice Le Blanc in the first of them, at p. 12, wherein it was only held that the vendor who was still upon the register and therefore the legal owner was not for that mere reason personally liable in assumpsit for work ordered by his vendee, through his master, who had taken possession, and so the said master was a "mere stranger" to the legal owner who, consequently, could not be made liable for his acts: *cf. Hibbs* v. *Ross, supra,* p. 548.

But the present actions are against the *res* under the radically different circumstances of the legal owner's sale, knowledge, and active participation, and no authority has been cited to show why the *res* should not be made answerable in such circumstances, whatever might be said about the personal liability of the registered owner. Here, though the purchaser was not the legal owner yet as he had been entrusted with the absolute possession of the vessel under the agreement for sale, whereby he became the beneficial owner, as he is styled in the cases, *e.g., Frost* v. *Oliver* (9), he became personally answerable on the facts for the work in question and the *res* also became answerable when the circumstances set out in sec. 4 arose, *i.e.,* "if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the court." As to this, the fact is that the ship had been under arrest by the marshal on the 19th of May last, before the institution of these causes, but the objection which was taken before on motion to dismiss on 22nd June last (10), is renewed, viz.: that the arrest which was at the suit of Henry Eriksen was only a sham proceed-

(6) [1806] 8 East's. 10.
(7) [1855] 5 E. & B. 419.
(8) [1866] L.R. 1, Q.B. 534, at p. 544.
(9) [1853] 2 E. & B. 301, at pp. 310 and 312.
(10) *See* [1922] 21 Ex. C.R. 401—3 W.W.R. 41.

ing and therefore should be disregarded and hence jurisdiction could not be founded thereupon. At the time I was of opinion that the evidence which would justify me in reaching such a conclusion was wanting, but at this trial it was proved that Henry Eriksen was at the time of this said suit, and is a member of the firm of Eriksen Brothers, one of the present plaintiffs and that his independent claim for $97.20 for wages as a "ship's carpenter on board the ship *Maple Leaf*" was in truth only a part of his firm's claim for $486.67 sued on herein and is included in the particulars of that claim as carpenter's wages, $346.60, and immediately after the ship was arrested at Henry's suit his firm's action was instituted, viz., on the next day. These facts so obviously disclose *mala fides* and an abuse of the process of the court that the arrest can only be viewed as a sham proceeding, and as not having any legal existence as regards those plaintiffs who improperly sought to profit by it, viz., Eriksen Brothers; but as regards the other claimants I see no reason why they are not entitled to support their suits upon its existence in fact, because in good faith and in innocence of any wrong-doing they instituted their suits relying upon the records of this court which on their face showed that its jurisdiction could be invoked.

The result is that judgment, with costs, will be entered in favour of all the plaintiffs, except Eriksen Brothers, whose suit is dismissed with costs for want of jurisdiction.

*Judgment accordingly.*