BRITISH COLUMBIA ADMIRALTY DISTRICT

1922
June 26.

ERIKSEN BROTHERS.....PLAINTIFFS;

VS.

THE *MAPLE LEAF*.....DEFENDANT.

Shipping—Arrest of ship—Jurisdiction in cases of equipping and repairing—Practice—Sham proceeding.

Held (following *Momsen* v *The Aurora*, (1913) 18 B.C.R. 353; 13 D.L.R. 429) that where a creditor finds a ship or the proceeds thereof are under arrest of the Court in pursuance of its valid process issued to the marshall in that behalf, he may without more bring his action for, and the Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping or repairing the ship. The burden is not cast upon the litigant to show this Court that, when suing, the original action under which the ship was arrested must eventually succeed.

Semble. There may be circumstances so strong as would justify the Court in saying that the action under which the arrest was made was only a sham proceeding and could therefore be disregarded.

Motion to dismiss action for want of jurisdiction.

June 12th, 1922.

Motion heard before the Honourable Mr. Justice Martin, at Victoria.

Hume B. Robinson for the motion;

E. A. Lucas, contra.

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Statement of Facts.

Henry Eriksen on the 19th of May, 1922, issued a Writ in rem against the Defendant ship endorsed as follows:—

The Plaintiff as Ship's Carpenter on board the ship *Maple Leaf* claims the sum of $97.20 for wages due him and for his costs;

and a Warrant for the arrest of the ship was immediately issued. On the next day a Writ was issued by the present Plaintiffs for $487 for work done at North Vancouver for repairing and equipping the said vessel. The vessel at the time the work was done was lying at North Vancouver and all work done was done at that place. Appearance under protest was entered in both actions and shortly afterwards the action of Henry Eriksen was discontinued.

According to material in Affidavits fyled in support of the Motion, Eriksen Brothers originally presented a bill to the Purchasers of the Ship, before action, for $560.77 on the 27th day of April, 1922, and Henry Eriksen did not present and never at any time presented to the purchasers of the Ship a bill for work alleged to have been performed as ship's carpenter. When the above mentioned bill was not paid, however, separate actions were launched as above recited.

Argument of Counsel.

HUME B. ROBINSON:—In support of the motion argued that the first action by Henry Eriksen was really launched for the purpose of getting the Ship under arrest so that when the present Plaintiffs commenced their action she would be under arrest and therefore the provisions of Section 4 of the Admiralty Act of 1861, 24 Victoria, Chap. 10, would be complied with and that since Henry Eriksen's claim was under $200 the Admiralty Court had no

jurisdiction on the face of it, by virtue of Section 191 of the Canada Shipping Act, Revised Statutes of Canada, Chap. 113, and the whole proceedings were an abuse of the process of the Court.

He cited the following:—

The Evangelistria (1) Ex-parte Andrews (2) and *Momsen* v *The Aurora* (3).

E. A. LUCAS—contra; cited *Letson* v *Tuladi* (4) and *Momsen* v *Aurora* (3).

MARTIN L. J. A. now (this 26th June, 1922) delivered judgment.

This is a motion by defendant to dismiss this action for want of jurisdiction.

It appears that on the 19th of May last one Henry Eriksen issued a writ against the defendant ship endorsed as follows:—

> The Plaintiff as Ships Carpenter on board the ship *Maple Leaf* claims the sum of $97.20 for wages due to him and for his costs.

And the ship was arrested the same day, and next day a writ was issued by the present Plaintiffs for $487, for work done in Vancouver for "repairing and equipping" the said vessel.

An appearance was entered on 30th May to Henry Eriksen's action and it was later discontinued for reasons which do not appear.

It is conceded that unless the ship can legally be said to have been "under arrest", within the meaning of sec. 191 (b) of the Canada Shipping Act, R.S. Cap. 113, in the action of Henry Eriksen there is no juris-

(1) [1876] 3 Asp. (N.S.) 264.
(2) [1897] 34, N.B.R. 315.
(3) [1913] 18 B.C.R. 353; 13 D.L.R. 429.
(4) [1912] 17 B.C.R. 170; 15 Ex. C.R. 134; 4 D.L.R. 157.

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Reasons for Judgment.

Martin L.J.A.

diction to entertain this action. It does not appear that Henry Eriksen is one of the plaintiffs in the present case who are indefinitely styled "Eriksen Brothers".

The defendant's counsel submits that an examination of the proceedings will disclose that this Court really had no jurisdiction to entertain the suit of Henry Eriksen because it was under the sum of $200 required by said sec. 191, and that the affidavit upon which the warrant for the arrest issued should have shewn such circumstances as would have brought it within one or more of the exceptions reserved by that section, but it is to be observed that there is nothing in that section which requires the plaintiff to show at the time the suit is instituted that he is within an exception, and hence it must be assumed that it was intended that he should have the right to prove his status at the trial or any prior time, if necessary. Moreover, the warrant for arrest was issued by the Registrar, and I have already held in *Letson* v *The Tuladi* (1) that, under our rules, even where particulars are prescribed the Registrar may dispense with them, and *a fortiori* where particulars are not prescribed it is difficult to see upon what principle they should be insisted upon *ab initio*. In *Momsen* v *The Aurora* (2), I held (under the corresponding sec. 165 of the Imperial Merchants Shipping Act, 1894,) that:—

> "as soon as a creditor finds a 'ship or the proceeds thereof are under arrest of the Court' in pursuance of its valid process issued to the marshall in that behalf, then he may without further ado bring his action for, and the Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping or repairing the ship. The burden is not cast upon the litigant to shew to this Court now that the original action under which the ship was arrested must eventually succeed."

(1) [1912] 17 B.C.R. 170; 15 Ex. C.R. 134; 4 D.L.R. 157.

(2) [1913] 18 B.C.R. 353; 13 D.L.R. 429.

Here there is nothing before me to warrant me in holding that the arrest under Henry Eriksen's suit was not by valid process. Of course there might be circumstances so strong as would justify the Court in saying that the action under which the arrest was made was only a sham proceeding, and therefore could be disregarded, but the facts here would not justify me in coming to such a conclusion.

There is nothing in the Evangelistria (1) which is contrary to this view, because it merely held that the arrest should be *de jure*, and it is in that light that the arrest in question here must be regarded.

With respect to *Ex-parte Andrews* (2), it is to be observed, first, that that is a decision on a section of a very different character relating to summary actions in certain specified courts and it would be very unsafe to deduce from it any general principle relating to ordinary actions for wages in this Court: second, that the statute there required as a condition precedent to the exercise of summary jurisdiction that a complaint on oath should be laid and it is only legally to be expected that such a complaint should *ab initio*, disclose all facts necessary to confer jurisdiction, but there is no condition of that kind imposed by the statute in question here; and third, that the rule for certiorari was granted as arising out of the summary proceeding itself and not as an indirect attack in another action as here. That case should obviously be restricted to the statute and facts upon which it was decided.

I am, therefore, of opinion that the motion should be dismissed with costs to the plaintiff in any event.

Judgment accordingly.

(1) [1876] 3 Asp. (N.S.) 264. (2) [1897] 34 N.B.R. 315.