TORONTO ADMIRALTY DISTRICT.

1918
Nov. 5.

FRED JOHNSON AND ADAM BROWN MACKAY,
PLAINTIFFS,

AGAINST

S.S. "CHARLES S. NEFF"
THE SHIP.

Motion to strike out party—Right of action by purchaser—Practice in salvage action.

A plaintiff who complains that his name is being used without authority may be retained as plaintiff if he has acquiesced in the action being prosecuted, although he may not have originally instructed the solicitor.

The purchase of an interest in a ship after the performance by it of salvage services does not necessarily disable the purchaser from prosecuting an action to recover same, when defended by underwriters.

It is proper to have the master and crew before the Court in an action for salvage.

The maritime lien for salvage arises when the service is performed.

It is not necessary in a salvage case to add cargo or freight unless a claim is made against them.

When actions are brought by the same plaintiff in Courts of different local jurisdictions, but by the same procedure, and the judgments in which are followed by the same remedies, such action will be treated as *primâ* facie vexatious.

MOTION by plaintiff Johnson to strike his name out of the record as a party plaintiff, and to stay proceedings, and motion by plaintiff Mackay to add the crew of the ship "Sarnor" as parties, plaintiff, and for the delivery of pleadings.

Heard in Chambers before the Honourable Mr. Justice Hodgins, Local Judge in Admiralty, on the 12th and 26th days of October, 1918.

R. S. Cassels, K.C., and *J. A. H. Cameron*, K.C., (Montreal), for plaintiff Johnson.

C. V. Langs, for plaintiff Mackay.

M. J. O'Reilly, K.C., for the ship.

HODGINS, Loc. J. (November 5th, 1918) delivered judgment.

It is contended on behalf of the plaintiff Johnson that his name was and is being used without his authority in this salvage action by his co-plaintiff Mackay. He was master of the "Sarnor" when she rendered the services in question, and he and Bonham, the engineer, are entitled to a share of the profits and an interest in the "Sarnor" if Mackay is repaid his expenditure in purchasing and operating that steamer.

Johnson has been cross-examined on his affidavit in this matter and the correspondence between him and Mackay and others has been produced. I am quite unable, in the face of what appears, to accept the profession on which this motion is founded, that he did not know of his claim for salvage as master and registered owner or his interest in it as a person entitled to a share in the vessel itself, nor can I believe that he did not know that it was being pressed in the form of an action, and that an attempt had been made to arrest the ship for that claim, or that the use of his name was not disclosed to him. My finding on this branch of the case is that he knew and acquiesced in the claim and in this action until Mackay took proceedings against him and Bonham. The writ in that case was issued on August 23rd, 1917, and the writ in Montreal on September 2nd, 1917. It looks as though this made him

apprehensive that he would lose his interest in the "Sarnor" unless he could recover enough from the "Neff" to pay up his share. His joining in the action in Montreal was, I think, due to Bonham. who is described in his affidavit as living there, and the present motion rather indicates a move to embarrass Mackay from getting his salvage claim settled until Johnson and Bonham have had a try for a large enough sum to pay him off altogether. However that may be, it is difficult after reading his examination and the log, to see how the "Sarnor," a vessel worth, in Bonham's estimation, something under $30,000, and bought for $6,700, could earn in three and one-half hours by towing the "Neff" to Port Colborne, a sum of $117,000, or over $33,000 per hour, while the wind was S.S.W., fresh and hazy and becoming strong later. I am, therefore, somewhat doubtful of the *bonâ fides* of that action for the entire value of the salved ship. See as to quantum of salvage remuneration *Pickford v. S.S. Lux*,[1] *The Werra*,[2] I cannot strike out Johnson's name in this action on the ground put forward. Acquiescence is quite sufficient to take the place of initial authority. *Hood v. Phillips*,[3] *Allen v. Bone*,[4] *Maries v. Maries*,[5] *Scribner v. Parcells*.[6] There is to my mind abundant evidence of it here. I cannot readily accept the apparent ignorance in a master mariner of eight years' standing, of his right to set up and maintain a claim for salvage which he now places at no less than $117,000, or of his right to seize the vessel for it, while she lay at Port Colborne. I think his lament

[1] (1912), 14 Can. Ex. 108.
[2] (1886), 12 P.D. 52.
[3] 6 Beav. 176, 49 E.R. 793.
[4] 4 Beav. 493, 49 E.R. 429.
[5] 23 L.J. Ch. 154.
[6] 20 O.R. 554.

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(in the letter of March 2nd, 1917, to Mackay), "It is "really too bad we didn't stay with her that day in "Port Colborne till all papers had been served," should be taken as he wrote it, i.e., expressive of genuine disappointment at not securing the "Neff" by warrant in this action before she got away on the day following the salvage operation. It appears also from the papers submitted that Johnson is the registered owner of the "Sarnor," but that he has disclaimed in favor of Mackay, who is the real owner. This acknowledgment and disclaimer is, however, accompanied by a contemporaneous document between Johnson, Mackay and Bonham under which, in the event of certain payment being made to Mackay, the others would be entitled to a 20 per cent. and 40 per cent. interest, respectively, in the ship "Sarnor," and that meantime the moneys received from the operation of the ship are to be used as therein designated. It is sworn by Bonham that Mackay is not the owner, but has only an equitable interest to the extent of 40 per cent. This is also Johnson's contention. The point raised is that when the accounts are taken Mackay will be paid off and that they have not been settled. I think Mackay is entitled to have Johnson, as registered owner, before the Court to avoid difficulty as to title, and if necessary to use his name upon proper indemnity being given if demanded. *The Two Ellens*,[1] *The Annandale*.[2] Johnson was also master, and under the agreement operated the ship. A recovery by Mackay alone might be blocked by Johnson's ostensible interest as owner. At all events, questions of title and the right to recover might arise if Johnson were absent, especially in

[1] (1871), L.R. 3 A. & E. 345, 355.
[2] (1877), 2 P.D. 179.

view of the purchase by Mackay since the institution of the suit, of a half interest in the "Neff" in April, 1917. However, Johnson may be bound by what has been done in the past, he has his own remedy if he wishes to abandon his claim now and elect to drop out as plaintiff. Exchequer Court (Admiralty) r. 228 applies the practice from time to time in force in respect to Admiralty proceedings in the High Court of Justice in England. These rules enable him to change his solicitor and then discontinue upon such terms as are open to him, (See *Roscoe's Admiralty Practice*),[1] or take any course in the future as his interest dictates. But on this motion he must fail, as up to the present time he is bound by what has been done.

He may now desire to remain as plaintiff, though represented by a different solicitor, or he may be willing that his name should be used upon proper indemnity being given, or he may prefer to come to Court, after changing his solicitor, for leave to discontinue altogether. On that application the exact position of himself and Mackay may be considered. I do not think that the purchase of a half interest in the "Neff" by Mackay disables him from prosecuting the present action which is being defended by the underwriters. Had Mackay been part owner of the "Neff" when the action was begun, it would be easier to determine the point. But how far the cases on that point are applicable I cannot at present say. The purchase after the services has been rendered may create a difference, and I do not desire to do more than mention the matter so that it will be considered in any future application.

[1] (1903), 3rd Ed., 303, 338, Order 7, rule 3; Order 26, rule 1.

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It is proper to have the master and crew before the Court in an action for salvage, and I will, under r. 30, add the crew and the underwriters as parties defendant and give leave to amend in that direction. *The Regina del Mare,*[1] *The Diana.*[2]

My refusal of Johnson's motion to strike out his name does not dispose of the whole matter. A stay is asked because of the institution of the action to which I have referred, now pending in Montreal.

The present action is one *in rem,* and jurisdiction properly exists under the *Admiralty Act,*[3] if the *res* was within the jurisdiction when the action began. The writ was issued on November 30th, 1916, and at noon that day the "Neff" left Port Colborne, in Ontario. The law assumes the issue of the writ at the earliest hour of the day on which it bears date, and there is therefore no doubt that it was well begun and is properly maintained to-day. The maritime lien arose when the salvage service was performed, and the writ was a process to enforce it. *The Bold Buccleugh.*[4]

The slipping away of the vessel does not affect the question. As a matter of fact, the salvage service was rendered chiefly in Ontario waters, and ended in a harbour within this Admiralty District.

The action in the Quebec Registry was begun without the leave of the Judge or Court,[5] and I have little doubt that when this fact is brought to the notice of the learned Judge in Admiralty in Montreal his attention will also be drawn to the cases dealing with the subject of priority. I may mention

1 (1864), Br. & L. 315.
2 (1874), 2 Asp. Mar. Ca. 366.
3 (1906), ch. 141, s. 18 (a).
4 (1850), 7 Moo. P. C. 267, 13 E.R. 884.
5 *Admiralty Act,* R.S.C. 1906, ch. 141, ss. 18, 82.

the following: *The Christiansborg,*[1] where Lord Esher quoted with approval the language of the late then Master of the Rolls in *McHenry v. Lewis,*[2] as follows:

"In this country, where the two actions are by the "same man in Courts governed by the same proced-"ure, and where the judgments are followed by the "same remedies, it is *primâ facie* vexatious to bring "two actions where one will do."

See also remarks on this point by Anglin, J., in *The A. L. Smith v. Ontario Gravel Co.*[3]

In the present case the actions are both in the same Court, where the same law is administered and the same remedies prevail, and it is easy to avoid any hardship by transferring the later action to the District in which the earlier action was commenced.

This action is for salvage against the ship "Neff," but not against cargo or freight. An action *in rem* against the cargo and freight can only be brought if cargo is on board the ship, *i.e.,* the cargo liable because salved with the ship.[4] The cargo that the "Neff" had aboard must have long since been unloaded and the freight paid; but they are not the same cargo and freight as are said to be attached in Montreal, which, I should think, would be in no way liable for this salvage. Both actions are therefore in the same position as to cargo and freight.

What are urged as defects in this action, I do not understand to be defects in the sense in which that word is used in dealing with the constitution of actions. To make a suit defective so as to deprive it

1 (1885), L.R. 10 P.D. 141.
2 22 Ch. D. 397.
3 51 Can. S.C.R. 39 at 78, 28 D.L.R. 491.
4 See *Rules of Practice.*

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of the right of priority in conduct, something is needed beyond matters which are readily amended, *i.e.*, something vital or essential disabling the plaintiff from suing. *Re McRae.*[1] It is not necessary in a salvage case to add cargo or freight, and this action is in no sense, as I have pointed out, defective by reason of its not being done.

Apart from these questions there is a larger one of the discretion to be exercised by me, as to staying the action, having in view the pendency of the action in Montreal, the seizure of the ship there and its release on bail.

The action in this Court was begun first. The services were performed for the most part within this local jurisdiction, and the writ properly issued while the *res* was in Port Colborne, in this Province. *Primâ facie,* the second action is vexatious, and no leave was obtained before it was instituted. The arrest and the release on bail are, of course, matters of moment, and the defendant vessel should not be unduly harassed. It was for this very reason, I presume, that the Statute requiring leave was passed. No application was made to me to transfer this action to the Quebec Registry, while one is pending there to transfer that action to the Toronto Admiralty District. The evidence will be more conveniently taken within this Admiralty District, where Johnson and Mackay live and where those on the "Neff" can more readily attend. The underwriters, too, who are interested, desire this action to go on here.

Were I convinced that any of the objections either as to the form of this action, its parties, or the amount claimed were real and serious, and that an

[1] (1883), 25 Ch. D. 16.

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injustice might or would happen if the case were not stayed, I should be disposed to yield to the motion, but I do not think the justice of the case demands this. The person moving is the one who has himself set in motion the second action. No good reason has been alleged for this, and no light was during his cross-examination permitted to be thrown on the services rendered so as to enable me to judge whether they indicated any reason to excuse or justify the double proceedings. The bail bond stands good in the Exchequer Court wherever the case is heard. I therefore refuse Johnson's motion with costs payable to Mackay and the underwriters—which, if this action proceeds with him as a co-plaintiff, will be paid in any event in the cause—he to elect within one week. If no election is then made and notified to the Registrar these costs will be payable forthwith after taxation.

I grant the order adding the crew as defendants and for pleadings to be delivered. The underwriters may intervene and defend with the owners of the other half interest. There will be no costs of the plaintiff's (Mackay) motion, other than would have been incurred on an ordinary motion for pleadings.

Judgment accordingly.