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THE MONTREAL DRY DOCKS AND SHIP REPAIRING COMPANY AND OTHERS (PLAINTIFFS).... } APPELLANTS;

*MAY 3.
*MAY 4.

AND

HALIFAX SHIPYARDS, LIMITED (INTERVENOR)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Admiralty law—Repairs on ship—Arrest pending repairs—Work after arrest—Lien—Priority.

While shipwrights, under contract with the owner, were working on a ship she was arrested in an action by creditors and eventually sold. The shipwrights were left in possession and, without any order from the court, completed the work and claimed payment in full from the proceeds of sale on the value of work done and materials supplied after as well as before the arrest.

Held, Idington and Brodeur JJ. dissenting, that the shipwrights having acted in good faith their claim in respect to the work done after the arrest so far as the selling value of the ship was thereby increased should be allowed in priority to that of the creditors.

Per Idington J. If it can be established that the creditors knew or should have known that the shipwrights had continued the work in good faith believing that they could share in the proceeds of sale for payment, the shipwrights and creditors should share in the fund *pro ratâ*. Failing to establish such knowledge the claim of the creditors should be restricted to the selling value of the ship at the date of the arrest and the shipwrights be paid out of the balance of the proceeds of sale.

Per Brodeur J. The shipwrights have no priority in respect to the later work but should rank *pari passu* with the creditors on the whole fund.

Judgment of the Exchequer Court (19 Ex. C.R. 259) varied.

APPEAL from a judgment of the Exchequer Court of Canada (1) in favour of the respondent.

The only question raised on this appeal was that stated in the head-note, namely, whether or not the Halifax Shipyards Co. had a right to be paid in full out of the proceeds of the sale of the Ship *Westerian*

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Brodeur J.

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for work and labour performed and materials supplied in alterations on the ship after her arrest by the plaintiffs. The judgment of the Exchequer Court allowed this claim in so far as the work done was reasonable and necessary.

Geoffrion K.C. and *J. B. Kerney* for the appellants.
Burchell K.C. for the respondent.

THE CHIEF JUSTICE.—I concur with my brother Anglin.

IDINGTON J. (dissenting).—The ship "Westerian" was sold under proceedings taken by appellants for the purpose of enforcing claims which for the most part would have constituted liens upon her, but, by virtue of the circumstances which had transpired, ceased to have that quality, unless and until in an analogous sense there arose a respective precedence in favour of each appellant, by virtue of the said respective appellants' proceedings over those having failed to take the like steps to enforce their respective claims.

At the time when the first seizure of the "Westerian" for the purpose of enforcing one of those claims, took place, the intervening respondent was engaged in making repairs upon her under a contract with the owners which it had entered into for doing so, according to some specifications named and others to be delivered as the work progressed.

At the time of the said seizure, said work to the value of $15,000 had been executed, for which it is admitted the intervening respondent had a lien prior to these other claims.

The said respondent seems to have paid no attention to the seizure made, but continued its work under said contract without making any application to the

court for protection in doing so, or permission thus to deal with property in the custody of the law, until another $15,000 worth of work, if to be estimated on basis of said contract, had been done.

The ship was sold for about $80,000, about four months after the seizure, and about two months after all the said work had been completed, and that fund is now in court.

It does not seem to have occurred to respondent until after the work had been nearly all completed to move herein. Then, upon doing so, an order was made by the District Registrar giving it liberty to appear and intervene in said action.

There should, I submit, have been something more decisive done by respondent than appears, before the sale of the ship, so that all concerned should have understood how they respectively were situated in relation to such a claim.

On the other hand I cannot help thinking that appellants, at the date of the application for said order allowing intervention, which took place about two weeks before the work was finished, must have had their attention thereby called to the fact that respondent must have assumed it would have a lien.

Nothing appears, in the case presented to us, helping us fully to understand many things bearing upon that very peculiar situation which was being developed.

I cannot help having a strong suspicion that the appellants stood by, knowing that the respondent was finishing its job, and hoping that it would be well done, or at all events acted with some knowledge thereof, in such a way as to debar them from taking advantage, as they seek to do by this appeal, of the curious legal situation which has developed.

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Counsel for appellant, on my suggesting during the argument something like unto such possibilities, very properly pointed out that his clients' places of business were in Montreal, and this work was being done in Halifax, and there was no evidence of any of them having agents in Halifax, and that therefore, we must assume, upon such facts, they were ignorant of what was being done, and hence we could not deal with such a situation, or hold them bound by any estoppel, equitable or otherwise, from claiming as they do now.

The solicitor of appellants, however, carried on business in Halifax. Should he not be held as such agent for all the purposes in question of each appellant?

I refer to all this because, after an examination of all the authorities cited by Mr. Justice Cassels and others referred to in argument, and occurring to me since, I remain, as the argument left me, under the impression that without more evidence than he had, or we have, to go upon, the terms of the order made are too wide.

To settle the law upon such a basis would enable parties situated as respondent was at the time of the seizure, to act as the respondent has acted herein, and to obtain as of right what the order now gives herein.

It may well be that no injustice may be likely to arise under this order now in question, but we have not such facts before us as to enable me to say so.

On the other hand, if my surmise is possible of demonstration, I think an opportunity should be given respondent to do so in the reference which has been directed below and must be had in any event.

And in the event of respondent succeeding in establishing actual knowledge of the later work being

done, or facts which would establish ground for the fair inference that they were put upon inquiry, and should have made further inquiry, and be bound by the highly probable results thereof, I should then be prepared to hold that the better way of applying the equitable doctrine invoked, would be to let the respondent rank in common with appellants upon the fund now in question.

I see no ground for supposing that any of the parties concerned acted fraudulently or from any improper motive but incline to think each and all of them acted in entire ignorance of the law because they never considered the curious possibilities.

But that having so developed each feels justified in putting forth such arguments as, in law, may or may not uphold their respective contentions.

To maintain in its present form the order appealed from would give priority to respondent in a way which might work out grave injustice to some of those concerned, and also hold out a premium to those hereafter tempted to offend against the law in like manner as respondent has done by proceeding improvidently without the leave of the court.

Whilst it is very desirable that appellants should not be permitted to profit at the expense of the respondent, yet there may, for aught we can learn from the record before us, have been created situations by reason of the course of the several proceedings taken which might render it impossible to push respondent's claim very far.

For example, we find the ship sold for $80,000, apparently about enough to cover all the claims and costs, except this item now in question.

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Assuming that the respondent's neglect to get leave of the court led all others innocently to believe that in fact the claims would be all covered by such a bid, and thus those others were induced thereby to refrain from protecting their interests by way of further bidding, would respondent be entitled in equity to encroach upon the fund further than in respect of items such as the removal of the coal and the like which saved the loss of the ship by the fire started in it?

I have been throughout under the impression that these assumptions are probably not maintainable and of little consequence. Yet I think it right to thus illustrate how much we are groping in the dark for want of a more detailed and accurate history of all that has transpired which can bear upon the equitable rights of the respective parties concerned.

The solicitor for the appellants, as already observed, carried on business in Halifax and probably acted throughout in all these proceedings which began with the issue of the first writ on the 17th of January, 1919.

Hence I imagine it improbable that the lastly mentioned of the alternatives to be considered will present any serious difficulties. Yet a very little information in way of dates might have saved the trouble of suggesting its possibilities.

The inquiry as to the respondent's claim began April, 1919—exact date not given— and as to what was done from 8th March, 1919, to that date, or a reasonable time before sale on 10th May, 1919, from which it might be inferred appellants had a reasonable opportunity to consider the possibilities of this claim and govern themselves accordingly in relation to the sale, we are left only to guess at the facts.

Passing these several suggestions, and again, for want of evidence, assuming nothing in any of them and considering the order made to rest upon the rather bare equity that inadvertently the respondent had so acted as to add to the proceeds realized, how far should the court below have gone?

I agree with the learned judge of the Exchequer Court that the value of the vessel when sold, if she had been in the same condition in which she was at the date of the seizure, is all appellants are entitled to out of the fund. How to determine that is no easy task.

Yet I think a reference to find such saleable value, on the 10th of May, 1919, on the assumption of the vessel being in the same plight and condition as when seized on 17th January, should produce the result sought for.

Regard being had to the actual facts bearing upon selling value on the date of the sale, is no doubt what should be proceeded upon. And the deduction of any additional saleable value, realized by virtue of the labour and expense of the respondent after the first seizure, should produce the same result.

Is that what the reference by the order now in question to determine "the value of the work and labour done and materials supplied on and after the 17th of January, 1919, as may be reasonable and beneficial upon and to defendant ship" is at all likely to produce? I am afraid not. Looked at from the point of view of the owners, no doubt all that was done would be reasonable and beneficial to the defendant ship. But, it is argued, and I think possibly with a great deal of reason, that what was done did not add to the realizable selling value so much as implied in the direction given.

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It is what actually was added, by virtue of said labour and expense, to the price realized, in other words, forms that part of the fund now in question, which respondent is entitled to.

In conclusion, any words should be adopted in the formal judgment which will embrace and adequately define and direct, first, a reference to determine whether or not the appellants having the conduct of the sale knew, or should have known, within a reasonable time preceding same, the facts that respondent had proceeded with the work now in question after the seizure, in good faith believing itself entitled to share, in respect of payment therefor, in the proceeds of the sale.

And if that answered affirmatively then no need for further inquiry. In that event the respondent should share *pro ratâ* with appellants in the distribution of the fund in question, and the costs of respondent throughout should be added to the amount proven to have been expended by it in labour and material after the seizure.

Then, secondly, default that finding and the ending of anything such as suggested above that would render it inequitable to do so, the saleable value of the ship, without such work and labour since seizure, as above indicated, should be determined by the referee, and the claims of the appellants upon the fund should be restricted thereto.

In such event the respondent should be paid its claims, for said work in question, out of the balance of the fund in court after deducting the saleable value so found.

The costs of the appeal in such latter event should be reserved to be disposed of by the local judge.

ANGLIN J.—The question for determination in this appeal is the right of the respondent intervenor, a shipwright, who, under a contract for repairs then in course of execution, had possession of the defendant ship at the time of her arrest at the suit of the plaintiffs, to claim priority in the distribution of the proceeds of the sale of the vessel under an order of the court in respect of some $15,000 expended in completing such repairs after the arrest, without the sanction of the court but in good faith. The circumstances out of which this question arises are sufficiently set forth in the judgment of the learned judge of the Exchequer Court.(1)

The learned trial judge (Drysdale J.) allowed the intervenor's claim for priority in respect of expenditure incurred before the arrest—properly no doubt, recognizing and protecting its common law possessory lien therefor; *Williams* v. *Allsup*, (2); 26 Hals. Laws of England Nos. 984 and 997; and in respect of that part of the judgment there has been no appeal. He wholly disallowed the claim for expenditure after the arrest because incurred without the sanction of the court.

On appeal from the latter part of this judgment the learned judge of the Exchequer Court allowed the intervenor's claim so far as its expenditure may be found to

be reasonable and beneficial upon and to the defendant ship

by the District Registrar assisted by merchants, to whom a reference was directed, and granted priority therefor over the claim of the plaintiffs. From this judgment the plaintiffs now appeal.

The claim of the plaintiff, the Montreal Dry Docks & Ship Repairing Company, is for the cost of earlier

(1) 19 Ex. C.R. 259. (2) 10 C.B.N.S. 417

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repairs in respect of which it had relinquished any possessory lien. Its co-plaintiffs have claims for necessaries supplied to the ship during the course of such earlier repairs and before she came into possession of the intervenor. The rights of all the plaintiffs *in rem* arise, therefore, only upon, and date from, the arrest of the ship at their suit.

No doubt the intervenor would have been better advised to have sought the sanction of the court before proceeding with further repairs after the arrest of the ship, which, however, was left in its actual possession until the repairs had been completed. That sanction not having been obtained, however, the question arises what are the respective rights of the plaintiffs and the intervenor in regard to the cost of such subsequent repairs.

Consideration of the numerous authorities cited and some others—none of them directly in point—has satisfied me that the basic principle on which this issue should be determined was correctly stated by Mr. Justice Cassels when he said:—

> These authorities indicate that the right of the plaintiffs who seized the vessel is on the value of the vessel at the date of the seizure (when they first acquired a right *in rem*) and not in the value subsequently enhanced by the necessary work of the shipwright.

That principle is found in the decision of Sir Robert Phillimore in *The St. Olaf* (1) in the following passage quoted by Mr. Justice Cassels:

> The right of the plaintiff who proceeds against the St. Olaf was to have the value of the vessel at the time she was brought into court, as far as the proceedings *in rem* are concerned. His right was to have this *res* made responsible for the damage inflicted on his ship, so far as the value of it extended, and the repair of the vessel subsequent to the damage for the purpose of preventing a deterioration of the property could not in any way increase his right or the obligation of the other party. It left them, as I conceive, in *statu quo* in that respect.

(1) 2 Ad. & Ec. 360.

As put by Dr. Lushington in *The Aline* (1) at p. 120):

With respect to any subsequent accretion in the value of the vessel arising from repairs done after the period when the damage was occasioned (in the case at bar after the arrest out of which the plaintiffs' statutory lien arises) his claim to participate in the benefits of such increase of value must depend upon the consideration how that increase arises, and to whom in equity it belongs.

As put by Lord Esher in *The Cella* (2) at p. 87:—

Whatever may be the judgment of the court it must take effect from the time of the writ * * * * But if the money be in court or the court has possession of the *res*, it can give effect to its judgment as if it had been delivered the moment after it took possession of the *res*. It is contrary to the principle of these cases and to justice that the rights of the parties should depend not upon any act of theirs but upon the amount of business which the court has to do. Therefore the judgment in regard to a thing, or to money which is in the hands of the court, may be taken to have been delivered the moment the thing or the money came into the possession of the court.

Under the doctrine thus stated the plaintiffs would not have the benefit of any repairs subsequent to the arrest.

It may be that

as against the owner who repairs his vessel at his own expense, the claim of the successful suitor would extend to the full amount of his loss against the ship and the subsequent repairs;

The Aline, (1), at page 120; yet a stranger making such repairs on the faith of a possessory lien, which he erroneously conceived he would have, although not entitled to an equitable lien, *The Aneroid* (4), at page 191, may be in a better position to receive equitable consideration to which the owner cannot lay claim. On the one hand the ship-wright cannot be allowed to improve the plaintiffs out of whatever interest they acquired in the *res* by the arrest. Their right was to have it taken and sold for their benefit as it then stood and that right may not be prejudiced, as it well might be if full effect were given to the contention of Mr.

(1) 1 W. Rob. 111. (2) 13 P.D., 82.
(3) 2 P.D. 189.

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Burchell that because the respondent had a contractual right, as against the owner, to retain the vessel and to complete the repairs to her which it had undertaken to make, the plaintiffs' security acquired by the arrest is subject to that right and the respondent is therefore entitled to priority over the plaintiffs for the full amount of its expenditure regardless of whether the selling value of the vessel was or was not thereby increased. While such a claim might be maintained if the assent of the plaintiffs to the completion of the repairs had been expressly given or might fairly be implied, (*Jowitt & Sons* v *Union Cold Storage Co.* (1) at page 10), the evidence here scarcely warrants such an inference. The respondent, in effect, asserts that its possessory lien extends to the post-arrest repairs because the Marshall did not deprive it of actual possession. But, as stated by Townsend J. in *The Acacia* (2),

> the property proceeded against ** when arrested is deemed to be in the custody of the Marshall, although it may really remain in the hands of the party

with whom he found it. The intervenor's possessory lien ceased with the arrest, but his interest then accrued will be protected by the court which deprived him of his legal possession. (*The Tergeste* (3), at pages 32-34). As to it the plaintiffs acquired their security on the *res cum onere*. For any subsequent expenditure, however, not sanctioned by the court, the intervenor's claim must rest on equitable considerations, such as prevailed in the two receivership cases cited by Mr. Justice Cassels. On the other hand, on what principle can the plaintiffs claim the benefit of whatever additional saleable value was

(1) [1913] 3 K.B. 1. (2) 4 Asp. (N.S.) 254.
(3) [1903] P. 26.

given to the vessel by the subsequent expenditure made by the intervenor? Equity would seem to require that, having acted in good faith, it should have the advantage of whatever increase in the saleable value of the *res* is brought about, so long as no prejudice is done to any statutory right acquired by the plaintiffs through the arrest (*The Aline* (1), at p. 121). As put in the factum of the respondent,

> much is to be said in favour of a principle which does justice to one party without doing injustice to the other.

While the Exchequer Court does not possess the full equitable jurisdiction now vested in the Probate Divorce and Admiralty Division by the Judicature Acts (*Bow McLachlan* v. *The Camosun* (2), in the decision of cases properly within the jurisdiction of the former Court of Admiralty, with which the Exchequer Court is vested, "equitable considerations ought to have their weight" (*The Saracen*, (3), at page 74. As put by Dr. Lushington in *The Don Francisco* (4), at p. 472:

> The Court of Admiralty may, in deciding a case, be influenced by equitable consideration.

From the very first it was held that the jurisdiction which the plaintiffs had invoked, originally conferred in 1840, (3 & 4 Vict., c. 65), should be exercised "in equity and upon equitable principles." *The Alexander Larsen* (5), in 1841, at pages 290, 295. It is certainly within the jurisdiction of the Exchequer Court to determine the extent to which the *res* formerly in its possession and the fund now in court representing it became a security to the plaintiffs by the arrest—how far it is subject to the so-called statutory lien in their favour; and it is also within its jurisdiction

(1) 1 W. Rob., 111.
(2) [1909] A.C. 597.
(3) 6 Moo. P.C., 56.
(4) 1 Lush. 468.
(5) 1 Wm. Rob., 288.

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to determine in respect of what amount the intervenor has a possessory lien and the priorities of these two liens *inter se*. By the fourth section of the Admiralty Court Act of 1861 the Admiralty Court was given express jurisdiction over claims for building, equipping or repairing any ship. In determining the question as to the extent of the plaintiffs' rights the court may properly so deal with the *res* under its control that an injustice shall not be done to a person who by the expenditure of money in good faith has improved the subject matter of the common security and increased its saleable value.

A careful study of the authorities has not only failed to disclose anything directly opposed to the disposition of the question before us which, as I have indicated, seems to me to be proper, but has led me to the conclusion that that disposition accords with their spirit, although nothing directly in point can be found.

I would therefore dismiss this appeal with costs and affirm the judgment of the learned judge of the Exchequer Court, as I conceive he intended it should have been framed. In order that his idea may be more clearly embodied and more precisely expressed, the formal judgment of the court as issued, should be modified by striking out of the third paragraph the words

as may be reasonable and beneficial upon and to the defendant ship

and substituting therefor

so far as the selling value of the defendant ship was thereby increased

BRODEUR J. (dissenting).—The question in this case is whether the respondents should have priority for the repairs made to the ship "Westerian" after she was arrested by the appellants.

The local judge in admiralty decided that no such priority could be claimed, but his judgment was reversed by the Exchequer Court.

The appellants admit that the respondents should rank *pari passu* with them.

The claims made by the two parties arise out of repairs which were made for the purpose of converting the ship from an inland water vessel into a sea-going ship.

At one time the appellants could have claimed a possessory lien for the repairs they did on the ship but for reasons which are not disclosed in the record they abandoned their possession and lost their lien.

The vessel was then delivered by her owner to the respondents to have the remodelling completed. When these repairs were going on the vessel on the 17th of January, was arrested.

In spite of this arrest the respondents went on to complete the repairs without obtaining from the court any authorization to that effect. There is no objection on the part of the appellants that the respondents should have priority for the repairs made before the seizure, but the contest is as to the rank of the claims for the repairs made after the arrest.

From the time the arrest took place the ship was in charge of the court and if some repair work had to be done to her, it became necessary for those interested to apply to the court to obtain necessary authorization to do the work. The respondents should not have assumed a power which was entirely in the discretion of the court. It would not be easy for us to determine whether such authorization would have been given or not.

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Brodeur J.

As far as equity is concerned, both parties are in the same position. The respondents will have the benefit, when the sale takes place, of the $50,000 worth of repairs made by the appellants to the vessel and, on the other hand, the appellants will have the benefit of the $25,000 worth of repairs made by the respondents.

The rule that they should all rank *pari passu* appears to me as being the most equitable one.

The appeal should be maintained with costs of this court and of the court below and the judgment of the trial judge should be restored with a proviso that the claims of the parties should rank *pari passu*.

Appeal dismissed with costs.

Solicitor for the appellants: *L. A. Lovett.*

Solicitor for the respondents: *C. J. Burchell.*