1929

July 30,
Aug. 2 & 6,
Aug. 16.

THE PRINCE EDWARD ISLAND ADMIRALTY DISTRICT

WILLIAM PATRICK BURKE ET AL.....PLAINTIFFS;

v.

THE SHIP *AMLA*.....DEFENDANT.

Shipping and Seaman—Arrest for wages—Practice—R.S.C. (1927), c. 42, sec. 183

The captain, mate and certain seamen of the *A.* had the ship arrested in a joint action *in rem* for wages. The claim made was for one month and some days, being not only the amount actually earned, but also for substantial sums not earned, which were more in the nature of damages.

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Held,—That wages cannot be sued for until earned, and that where a hiring at so much a month is made, no wages are or can be earned until the whole month's service is performed.

The owner of the ship defendant appeared unconditionally and later raised a question of jurisdiction.

Held,—That in Admiralty where the defendant wishes to raise an objection to the jurisdiction of the Court, in a case where the Court has jurisdiction over the subject matter, he should appear under protest whether the action be *in rem* or *in personam.*

Held,—That a Master suing for wages and disbursements is bound to furnish accounts before bringing his action, otherwise he will not be entitled to his costs. [*The Fleur de Lis* (L.R. 1 A. & E. 49) referred to.]

ACTION *in rem* for wages paid by the Captain, Mate and Seaman of the defendant ship.

The case was tried before the Honourable Mr. Justice Stewart.

J. J. Johnston, K.C., for plaintiff.

Donald McKinnon, K.C., for defendant.

The facts are stated in the reasons for judgment.

STEWART L.J.A., now (Aug. 16, 1929), delivered judgment.

1. This is a joint action *in rem* for wages brought by the Captain, the Mate, the Engineer, two firemen, two seamen and the cook of the ship *Amla* against the defendant ship —a steamship of 141·59 gross and 57·90 register tonnage, registered in Charlottetown and owned and operated by the International Fish Corporation, Limited, of Georgetown, Prince Edward Island.

2. The plaintiff, William Patrick Burke, in his affidavit to lead to warrant, claims $197.75 for wages due to him as master on board the defendant ship for one month and sixteen days at $150 per month.

[The learned judge here gives the details of the seven other claims of the same nature as that of Burke.]

10. All the said plaintiffs in their evidence given in Court spoke of being hired by the month.

It is a well established legal principle that wages cannot be sued for until earned, and that if a hiring at so much a month is made, no wages are or can be earned until the whole month's service is performed. This is so well known that it is difficult to understand why the plaintiff in this

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case should have set the law in motion to arrest the defendant ship, not only for the amount due for the several months that had been earned but for substantial sums that had not been earned. If such an attempt had been made in the case of the issuing of a bailable writ or an attaching order in pursuance of the powers conferred by the Garnishee Act, such a writ and such an order would surely be set aside. The unfairness of the thing consists in this, that no debtor should have either his property or person placed under arrest for a larger claim than is justly due. The contention of all the plaintiffs at the trial was that they had never been discharged from their several positions in the defendant ship and that they still held these positions. By what right or authority can the owner of the ship be placed in the position of being compelled to pay wages that have not been earned in order to recover possession of his ship? If the crew had been improperly dismissed, they might recover for the extra days, but that would be in the way of damages. If an application had been made on behalf of the ship in proper time to have the arrest set aside, it is difficult to see by what means this could have been successfully avoided, but such an application, after the parties have come prepared to have the case tried on the merits, appears to be too late. The owner of the ship instead of applying in time filed an absolute appearance to the action. In Admiralty practice, if the defendant wishes to raise an objection to the jurisdiction of the Court in a case where the Court has jurisdiction over the subject matter, he should appear under protest whether the action be *in rem* or *in personam* (1).

Counsel for the ship, however, relies on other grounds for the ship's release and the setting aside of the warrant and the arrest and for having the action dismissed than for want of jurisdiction. These are:

1st. There are no wages due to the crew as seamen;

(1) *The Vivar*, 2 P.D. 29.
The Vera Cruz, 9 P.D. 96; 10 App. Cas. 59.
The Seaward, 3 Ex. C.R. 268.
The Heligoland, Swaby, 496.
The Blakeney, 5 Jur. N.S. 418.
The Louisa, 9 Jur. N.S. 676 (Pt. 1).
The Cargo, ex Sultan, Swaby, 509.

2nd. Captain Burke is not captain of the ship, and the work he did was not done as captain of the ship.

I have gone carefully over all the evidence given at the trial and the telegrams and letters placed in evidence and find that the manager of the company employed Captain Burke to get the ship fitted out and ready for a voyage at least to Pictou and to engage a crew for that purpose; that he also employed the engineer, Winchester, for the same purpose so far as the engine room was concerned, and that the latter obtained authority to select firemen.

There was certainly delay on the part of the captain in setting out for Pictou. This is explained by his erroneous idea that the material men had it in their power to prevent the ship sailing until their bills had been paid. He also advanced the excuse of the failure of the president of the company to supply him with funds to pay for the slip charges at Pictou. Taking into consideration that the president and manager of the company was in Charlottetown on May 29 and had on that day authorized the captain to procure supplies from Moore & McLeod, Limited, for the ship I feel that this delay of itself would not justify depriving the captain of his wages. Besides, it came out in evidence that the company owning the ship had intended to use her in the fish trading business throughout the Maritime Provinces and that she was being fitted out for that purpose. In the absence of express instructions by the president it was not unreasonable for the captain to select his crew with a view for such a purpose.

In *Mills* v. *Gregory* (1), the seamen maintained a suit for wages though the ship had not sailed out of the river; and in *Wells* v. *Osmond* (2), a suit for wages succeeded which became due on a contract to go on a voyage although the voyage was put off.

The master suing for wages and disbursements is bound to furnish accounts before bringing his action, otherwise he will not be entitled to his costs. The *Fleur de Lis* (3).

The master in this case should have procured accounts from the material men and furnished them to the owner a reasonable time before taking action. He, however, furnished them on June 7, and on June 8 had the defendant

(1) (1754) Sayer 127. (2) (1794) Mod. 238.
(3) (1866) L.R. 1 A. & E. 49.

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ship arrested for his wages. This bears on its face rather sharp practice and for that reason, so far as Captain Burke is concerned, there will be no costs allowed him.

The plaintiffs' counsel at one time during the course of the trial advanced an opinion that the captain and seamen could only recover the amount of their several wages sworn to in their affidavit to lead to warrant and cited in support *The Carolina* (1). At another time in closing his case he abandoned this view and claimed wages for the captain and crew at the monthly rates specified down to the making of the decree, and cited in support of his contention *The Great Eastern* (2). Neither of these two cases runs counter to any established legal principle and they are easily distinguishable. The former establishes the principle that when a master or seaman institutes an action for wages he is taken to have thereby indicated that he considers his connection with the ship determined. In that case as in the present, there was no wrongful dismissal of seamen. Sir R. Phillimore in giving the judgment of the court said:

> The practice is founded upon the principle that where a seaman institutes a suit for wages, he ceases to have any claim for subsequent wages upon the ship. It is said there is a great hardship in the mariner being left without any claim for support after he has left the ship in the interval between the institution of the suit and the hearing of the cause. But substantially he would receive a sum of money for his maintenance and detention when the question of costs came to be decided. It is said these men stayed on board after the institution of the suit and at the request of the master. These are circumstances to be given due weight.

The *Great Eastern* case is wholly unlike the present one. It was a claim for damages for wrongful dismissal of the crew, which was held to be within the cognizance of the Court of Admiralty. The engineer and seamen were engaged for a voyage on a foreign going ship, which voyage was never entered upon. The seamen, after serving on board the ship for a time, were discharged. It was held in that case that a lien exists for damages after a wrongful dismissal, but that case has no possible bearing on this case.

I allow each of the plaintiffs one month's wages, and I fix the allowance for maintenance for all the crew, except the captain, at $60 each. The crew seems to have been kept connected with the ship until the trial at the request of the captain, although it is not easy to understand why

(1) (1875) 34 L.T.R. 399. (2) (1885) 53 L.T.R. 594.

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they were so kept. I fix the claim of the captain at $117.75; that of the mate at $125; that of the cook at $125; that of the engineer at $210; those of the two firemen at $140 each and those of the two seamen at $120 each; and I give judgment in favour of the plaintiffs for the several amounts stated with costs.

Judgment accordingly.