ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT.

1919
November 25.

HALIFAX SHIPYARDS, LIMITED (Intervenors)

APPELLANTS;

AND

MONTREAL DRY-DOCKS AND SHIP REPAIRING COMPANY, LIMITED, a body corporate, et al,

PLAINTIFFS,

RESPONDENTS.

AGAINST

THE SHIP "WESTERIAN."

Admiralty law—Effect of arrest on repairs subsequent thereto—Beneficial repairs—Possessory lien—Priority.

The "Westerian" was formerly used on inland waters and having been purchased for ocean trade, had to be repaired and altered to fit it as a sea-going vessel. The respondent did certain repairs at Montreal and then at the ship agent's request, gave up possession, (thereby losing their shipwright's lien) and permitted her to be taken to Halifax where she went into appellants' dry-docks who completed the work. Whilst in the latter's possession, on the 17th January, 1919, she was arrested at the instance of respondents.

The Marshal saw the work going on but gave no order to the workmen to stop. He left no one in charge and there was no change in the actual possession. The work was continued in good faith and was finished on the 27th March following, the ship being subsequently sold for $80,000 and money deposited in Court. The repairs done subsequent to arrest were necessary and required to class her as an ocean going vessel and were performed in continuance of the contract.

**Held,*—Upon the facts stated, that the shipwright has a possessory lien for repairs done to a ship, and should be paid, *in priority,* not alone for such as were done to a ship, previous to her arrest, but also for such as were done after, and which are beneficial and necessary to and upon the ship.

*The appeal taken to the Supreme Court of Canada is still pending.

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2. That in such a case a reference should be made to the registrar to ascertain the extent to which the repairs after arrest are beneficial.

THIS is an appeal from the judgment of Drysdale, J., Local Judge in Admiralty, Nova Scotia Admiralty District, which judgment is varied by this Court.

C. J. Burchell, K.C., for appellant;

J. B. Kenney, for the respondent.

The facts are fully stated in the reasons for judgment of the Honourable Sir Walter Cassels which are as follows:

CASSELS, J., now (25th November, 1919), delivered judgment.

Appeal on behalf of The Halifax Shipyards, Limited, Intervenors, from the judgment of the Local Judge in Admiralty for the Admiralty District of Nova Scotia, delivered on the 1st day of August, 1919.

The appeal was argued before me on the 28th day of October, 1919. *Mr. Burchell,* K.C., appeared for the appellant, and *Mr. Kenny* for the respondent.

On behalf of the appellants Mr. Burchell requested that he might have the right to furnish a memorandum of further authorities. This request was granted, he being directed to deliver to the respondents' solicitors a copy of any such memorandum.

I have been furnished with a memorandum by Mr. Burchell, and also a memorandum on behalf of the respondents.

The facts connected with the appeal are simple, and there is no serious conflict in connection with them.

The ship "Westerian" was sold by the Montreal Transportation Company to certain persons residing in Cuba. She was apparently a vessel plying in the inland waters. It was desired by the owners that the vessel should be repaired, and to a certain extent remodelled, to fit her for the ocean trade, and thereupon the owners in Cuba apparently turned over the work of reconstructing the vessel to N. E. McClelland & Company, who let the work to the Montreal Dry Docks Company, a company carrying on business in Montreal, and the work necessary to be done was carried on partially in Montreal. It is said that the Montreal Company performed work amounting to somewhere in the neighborhood of $50,000.

It appears that N. E. McClelland & Co., ascertaining that the work could not be completed in Montreal within such time as would enable the ship to get down the St. Lawrence before the river froze up, the plaintiffs, The Montreal Drydocks and Ship Repairing Company, Limited, permitted the vessel to be taken from their works thereby losing their shipwright's lien. She was taken to the City of Halifax to have the work that had to be performed completed; and, McClelland & Co., then made arrangements with the present appellant, The Halifax Shipyards, Limited, to complete the work. The vessel was thereupon delivered to the Halifax Shipyards, Limited, and remained in their possession until the works contracted to be performed were completed.

The action was brought in the Admiralty Court and the ship was arrested on the 17th January, 1919. At this time she was in the possession of The Halifax Shipyards, Limited, undergoing repairs.

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It is important to bear in mind that at the time the warrant was served on the ship, namely the 17th January, 1919, the repairs required in order that the vessel could be classed for ocean going service, she having been previously classed for inland waters only, had not been completed. Although in point of fact the warrant was served on the ship on the 17th January, 1919—there was no change in the actual possession of the vessel—she was still left in the possession of The Halifax Shipyards, Limited, the Intervenors in the action. There was no notification given to them that they were not to proceed with the repairs, and The Halifax Shipyards, Limited, in perfect good faith continued to perform their contract. The work was finished on or about the 27th March, 1919. The repairs subsequent to the alleged seizure were repairs necessary, and were performed in continuance of the contract for the purpose of having the vessel classed for ocean going service. Had these repairs not been made the vessel could not have been so classed. It is claimed that these repairs amounted to the sum of about $15,000. The present appellants claim they are entitled to a shipwright's lien for this amount in addition to what has been allowed by the learned judge.

The Deputy Marshal, Malcolm H. Mitchell, states in the affidavit filed by him, that he "personally serv-"ed the writ and the warrant on the said 17th day "of January, 1919, in the usual way, being the first "writ and warrant served on the said ship." He states further, "nobody was left in charge of the "said ship by the Marshal during the time the said "ship was under arrest, but I spoke to the Captain "and told him the ship was under arrest and could

"not leave port without bonds being first provided.

"4. When I made the arrest the ship was under-"going repairs and I saw workmen employed in "making said repairs. I did not notify the said "workmen that the ship was under arrest or to stop "the making of said repairs, as I had no instruction "to do so.

"5. When the ship was arrested she was moored "to the 'Lake Manitoba' at the wharf of the Halifax "Shipyards, Limited, at the dry-dock, Halifax."

The learned Judge states as follows, in his reasons for judgment, dated August 1st, 1919:

"The only point remaining open in this case is "in connection with the taking of accounts. The "Shipyards Company intervening claim a posses-"sory lien. At the time of arrest, January 17th, "1919, the ship was in the possession of the Ship-"yards Company, undergoing repairs. The Com-"pany will be protected in respect of any work "done up to that time but they now assert a claim "for work done after the arrest. This cannot be "allowed. After January 17th the ship was in "charge of this Court, and no orders were ever "given for any work after arrest. I will see that "the possessory lien is protected but claims for "work done after the arrest cannot be allowed."

The appeal on behalf of The Halifax Shipyards, Limited, is from that part of the judgment which relates to the work done between the time of the arrest, January 17th, 1919, and the date of the completion of the repairs.

It was stated on the appeal by respondent's counsel that the learned judge did not intend to disallow these subsequent repairs, that all the learned judge

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intended was that the privileged claim should be disallowed, and that for the balance of the work the Intervenors should rank *pari passu* with the other creditors. It was stated by Mr. Kenny that an application would be made to the learned judge to have his judgment so varied. However, no such variation has been made, nor do I think the learned judge intended that the order should be so varied. His reasons for judgment show that the claim was disallowed by reason of the fact that after January 17th, 1919, the ship was in charge of the court and no orders were ever given for any work after arrest. The formal judgment directs, as follows:

"The Judge ordered that the District Registrar "pay out of Court to the Intervenors or their "solicitor the value of the work and labour done "and materials furnished by the said Intervenors "upon and to the defendant ship on and before "the 17th day of January, 1919, to be found by the "District Registrar and merchants."

And in his own handwriting he adds:

"and that the Intervenors have priority therefor. "And the judge ordered that the claim of the "Intervenors for work done and materials furn-"ished after January 17th, 1919, be disallowed."

I listened carefully to the arguments of the learned counsel, and have considered the various authorities referred to by them upon the argument, and in their written memoranda.

With great respect for the learned judge who determined this case, and who has had a long experience in dealing with this class of case, I have come to the conclusion that he has erred in disallowing the lien for these subsequent repairs.

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The vessel has been sold with these repairs and realized, it is stated, the sum of about $80,000. It seems to me very inequitable and unjust that this sum of money realized unquestionably in part by the enhanced value given to the vessel by reason of these subsequent repairs, should all enure to the benefit of those creditors who had no special lien upon the vessel, and that that portion of the price which the vessel brought by reason of these repairs so made by the Intervenors should not enure to their benefit. Apparently, the reason for the disallowance was that the repairs were continued subsequent to the alleged seizure, and were proceeded with without the order of the court.

There is but little doubt that had the court been applied to, directions would have been given to the Intervenors to continue the work provided by the contract, and no question as to the right of the ship-wrights to their lien would have been raised.

There seems to be no direct authority bearing upon the question. There are authorities, however, which seem to me to bear strongly upon the point before the court.

The "*Aline*"[1] Lushington, J., says:

"Again, with regard to the case of the person "who has received the damage, is not his interest "benefited by the vessel being repaired and en- "abled to proceed to her port of destination? Is "he injured in the amount of his indemnity fund? "Not at all. His interest I have already stated, "is co-extensive with the rights possessed by the "owner of the vessel at the time when the damage "is done, and his claim is paramount to the extent

[1] (1839), 1 Wm. Rob. 111, at 119.

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"of her value at that period. With respect to any "subsequent accretion in the value of the vessel "arising from repairs done after the period when "the damage was occasioned, his claim to partici- "pate in the benefit of such increase of value must "depend upon the consideration how that increase "arises and to whom it in equity belongs. Against "the owner who repairs his vessel at his own ex- "pense, the claim of the successful suitor would "extend to the full amount of his loss against the "ship and the subsequent repairs. Where, how- "ever, the repairs have been effected by a stranger "upon the security of a bond of bottomry, the case "is altogether different; and I cannot hold that "universally bonds so granted must give way to "prior claims of damage."

In the case of *The "Acacia,"*[1] Townsend, J., at p. 256, referring to the case of the vessel states as follows:

"The fact is, that in this case the vessel has "never left the possession of the Messrs. Harland "and Wolf, and is this moment fastened to their "quay; the marshal seems to have adopted their "possession; his possession is merely constructive "and technical, for the actual possession is still "with the defendants."

The facts in the case before me are very similar.

In *Williams v. Allsup,*[2] Erle, C. J., referring to the facts of that case at p. 426, states:

"Under these circumstances, the mortgagor did "that which was obviously for the advantage of "all parties interested; he puts her into the hands

[1] (1880), 4 Asp. (N.S.) 254.
[2] (1861), 10 C. B., (N.S.) 417.

"of the defendant to be repaired; and, according "to all ordinary usage, the defendant ought to "have a right of lien on the ship, so that those who "are interested in the ship, and who will be bene- "fited by the repairs, should not be allowed to take "her out of his hands without paying for them."

Then at page 427 the learned judge states, as follows:

"There, is, no doubt, some difficulty in the case. "But it is to be observed that the money expended "in repairs adds to the value of the ship; and, "looking to the rights and interests of the parties "generally, it cannot be doubted that it is much to "the advantage of the mortgagee that the mort- "gagor should be held to have power to confer a "right of lien on the ship for repairs necessary "to keep her seaworthy."

In *The "Gustaf,"* Lush. (1862), 506, Dr. Lushington, at page 507, states as follows:

"The present question, what claims shall be "allowed to take preference of the lien by common "law of the shipwright, who retains the ship in his "possession *until the Court of Admiralty lays its "hand upon it and orders it to be sold, is not with- "out difficulty.* I am not aware that before I oc- "cupied this chair, any such question ever arose. "Indeed, I may confidently say that none such "ever did arise, and consequently I have no "authority to resort to, beyond the proposition "which is subject to no doubt—that certain liens, "such as salvage and wages, attach to the ship.

"On consideration, I think that, save in cases "which may appear to have a paramount claim,

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"the right of a shipwright—the common law lien "—*ought not to be infringed upon.*"

Then at page 508:

"I think it right to add, that the chief difficulty "I have experienced is in satisfying my own mind "that any claim at all could compete with the com- "mon law lien, which is, that the shipwright may "hold till paid, *or until possession is forcibly de-* "*manded by this Court.*"

In *The "St. Olaf,"*[1] Sir R. Phillimore states as follows, at page 361:

"Another objection, however, was taken, and it "was urged that at least in this case the value of "£1,037, though admitted to be that of the ship at "the time when she was arrested, is not the value "at which she ought now to be released, and for "this reason it appears that since the *lis* has been "pending in this matter, application was made "to the Court by the foreign owner of the *St. Olaf* "to be allowed to make certain repairs in his ves- "sel. Certain repairs were made, and I will take "it that these repairs were without the consent "of the opposite party. I am still very clearly of "opinion that they could not prejudice any right "which the owners of the *St. Olaf* possessed be- "fore they were made. I am clearly of that opin- "ion myself, because 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 upon his

[1] (1869), L. R. 2 A. & E. 360.

"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."

These authorities indicate that the right of the plaintiff who seized the vessel is on the value of the vessel as at the date of the seizure, and not the value subsequently enhanced by the necessary work of the shipwright.

Analogous cases are to be found where a Receiver has been appointed of property and repairs have been made without the authority of the court. In these cases while *primâ facie* repairs are disallowed, the court directs a reference as to whether the repairs were reasonable.

In *Blunt v. Clitherow*,[1] the Master of the Rolls, Sir William Grant, points out that a considerable portion of the repairs was done previously to the appointment of the Receiver, and a reference was directed as to whether the repairs subsequently performed without the direction of the court were reasonable, and upon a favorable report the claim was allowed.

In *Tempest v. Ord*,[2] Lord Chancellor Eldon pointed out, that the usual course now is a reference to ascertain whether the repairs were beneficial and if so the claim is allowed,, notwithstanding that the order of the court had not been applied for.

I think the same course should have been followed by the learned local Judge.

[1] (1802), 6 Ves. 799.
[2] (1816), 2 Mer. 55.

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The evidence is fairly voluminous as to the value of the work and the labour done between the 17th January, 1919, until the completion of the work, but if the parties cannot agree upon the amounts, I think the judgment of the learned Judge should be varied by ordering the District Registrar to pay out of court to the Intervenors or their solicitors the value of the work and labour done and materials furnished by the said Intervenors, as may be reasonable and beneficial upon and to the defendant ship subsequent to the 17th January, 1919, as well as what has been allowed up to the 17th January, 1919, and that the judgment should be so amended.

That portion of the Judge's order which directs the plaintiff to have the costs of this application to be taxed should be set aside, and in lieu thereof it is ordered that the Intervenors should have the costs of the application and of this appeal to be taxed and paid by the plaintiff. Subsequent costs of the reference to be reserved.

Judgment accordingly.

Solicitors for appellants: *McLean, Burchell, Ralston & Co.*

Solicitors for respondents: *McInnes, Jenks, Lovett & Co.*