

BRITISH COLUMBIA ADMIRALTY DISTRICT..

BETWEEN:

MCARTHUR AND OTHERS PLAINTIFFS.

AGAINST

THE SHIP "JOHNSON".

1913
March 11.*Admiralty law—Misleading defence—Costs—Rule 132—Discretion.*

Although the plaintiff fails in his action, if the defence is so misleading as to invite unnecessary controversy and prolong the trial, the Court, exercising its discretion under rule 132, will make no order for costs in favour of successful defendant.

THIS was an action for seaman's wages tried by the Honourable Mr. Justice MARTIN, Local Judge in Admiralty for the British Columbia Admiralty District, at Victoria, on the 6th of March, 1913.

D. S. Tait, for plaintiff.

Sydney Child, for defendant.

MARTIN, L. J., now (11th March, 1913) delivered judgment.

This is an action for seaman's wages, the plaintiff McArthur claiming the sum of \$150 for two months' wages as engineer on the gasoline launch *Johnson*, and the plaintiff McKenzie claiming \$375 for five months' wages on the same vessel.

Owing to the unusual circumstances and the prior relationship of the plaintiff McKenzie with the vessel's owners as their guest, I have had not a little difficulty, on the largely conflicting evidence, in arriving at a conclusion as to the true state of the case; but I am finally of the opinion that the said plaintiff has failed to establish an express contract of hiring, or one

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based upon *quantum meruit*. Apart from other things, it is particularly unfortunate for him in the circumstances that he should not even have made a request for his wages for the whole time of his employment. The inference to be drawn from such a strange omission was pressed by defendants' counsel, and is hard to overcome where the witnesses disagree. On the other hand, I am satisfied that he performed useful and valuable services to the owners over and above his board and lodging; and to such an extent that it was never contemplated by them that he should account for the various small sums of money that were given to him occasionally or for the bill of goods, amounting to \$202.50, which he got from David Spencer, Limited, on the arrangement that they were to be charged to Mrs. Anderson. Therefore, the so-called counter-claim for \$300 fails, even assuming that it is properly set up and that it is of such a nature that this Court could entertain it (1). The result of this plaintiff's action is that it must be dismissed, with costs, but as the defendants have set up a largely misleading defence against his claim, which almost invited further controversy, and did considerably prolong the trial, I exercise the discretion conferred upon me by Rule 132 and make no order for costs in their favour as against McKenzie.

With respect to the plaintiff McArthur, in view of the positive denials of both the defendants of any authority given to McKenzie to engage him, and of their version of the explanation given of his presence on the vessel, the evidence is not sufficient to support his claim, and it must be dismissed, with costs.

Judgment accordingly.

(1) *Bow, McLachlan & Co. v. Ship "Camosun"* (1909), A. C. 597.